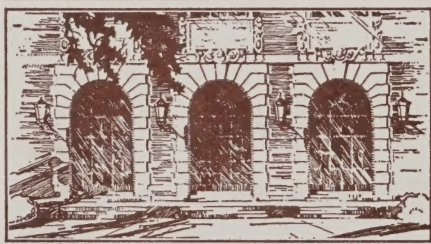


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FOREIGN AND DOMESTIC LAW

A CONCISE TREATISE

ON

PRIVATE INTERNATIONAL LAW

BASED ON THE DECISIONS IN THE
ENGLISH COURTS

BY

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Examination, Hilary Term, 1874*

FIFTH EDITION

BY

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PREFACE

TO THE FIFTH EDITION.

THIS treatise first appeared in 1878. The learned author's object was not to compete with such works as those by Story and Westlake who had expounded the theory and science of Private International Law, but to reduce to order the more or less chaotic mass of English decisions and to construct the framework of Private International Law, not from the *dicta* of jurists, but from the judicial decisions in the English Courts which have superseded them. In the second edition published in 1890, nearly three hundred additional cases were added and much of the text re-written by Foote. The third edition which appeared in 1903 was also edited by the learned author and owing to the continued increase of decisions greatly enlarged. The fourth edition, published in 1914, was edited by Dr. Coleman Phillipson, who, whilst making considerable additions, was able by re-writing some portions of the book to slightly reduce its bulk. In preparing the present edition the present editor has been unable to emulate this feat. To the normal increase of judicial decisions and statutory enactments must be added the new problems arising out of the War which have demanded the attention of the Courts and the legislature alike. The Nationality Act, it is true, was the product of normal development, although it received the royal assent on August 7, 1914. It necessitated the re-writing of Chapter I., but although the Act is embodied in the text and the Act of 1870 together with the Report of the Naturalization Laws Committee omitted, the chapter has been increased by eighteen pages. So too, the Bankruptcy Act, 1914, demanded a restatement of the law on that subject, whilst the new rules relating to service out of the jurisdiction involved further additional matter. Arising out of the War the *Daimler Case* and those cases which accepted its *dicta* have established a new doctrine in the law of corporations, a doctrine also adopted in France but rejected in the United States. The recognition of new States again came up for judicial examination, together with the question of the liability of a Sovereign State engaged in private trade and the ex-territorial character of public vessels. Brief reference only is made to the numerous cases under the Trading with the Enemy Acts, since this subject

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more properly falls within the province of Public International Law. The recent developments in maritime matters, exemplified, for instance, in the Carriage of Goods by Sea Act, 1924, and the revised York-Antwerp Rules, 1924, both due to the initiative of the International Law Association, have added considerably to the bulk of the book, whilst those in commercial matters, such as proposed amendments to the Arbitration Act, 1889, and the Convention with France for the enforcement of Arbitral Awards, have necessitated a new section to the chapter on Foreign Judgments. Lastly the decision of the House of Lords in the case of *Casdagli v. Casdagli* dealing with domicile in non-Christian States; the decisions relating to the proper date for conversion of foreign currency into sterling; and those, known as the Russian Bank Cases, dealing with the alleged dissolution of private companies in Russia and of their branches outside, and the respective rights of their contributories and creditors have necessitated a new chapter. To make room for all this abnormal matter and the numerous normal decisions and statutes, the present editor has not hesitated to cut down certain of the old topics, not strictly germane to the subject, and which may be found in text-books devoted entirely to their treatment. He has also omitted the summaries which formerly appeared at the end of the book. These are not really required by the practitioner, and they will be available to the student under a separate cover. The Introduction has also been omitted. That part dealing with the non-existence of Private International Law in ancient Greece and Rome is now completely out of date. Modern research has demonstrated that such a system was in force under the Roman Emperors, and even in the cities of classical Greece.¹ That part containing a synopsis has little value for the practitioner. In a work covering such a vast field shortcomings are inevitable. It is hoped that these will not prove so serious as to render the book less valuable to practitioners and students than its predecessors. Those who are both authors and editors of legal text-books know that it is easier to write a new work than to edit an old one.

HUGH H. L. BELLOT.

2 KING'S BENCH WALK,
INNER TEMPLE.
January, 1925.

¹ Cf. Bellot, "La Theorie Anglo-Saxonne des conflits de lois"; Coleman Phillipson "The International Law and Custom of Ancient Greece and Rome" (1911); Baron Korff, *American Jour. of Intern. Law*, 1924, p. 246; Vinogradoff "Outlines of Hist. Jurisprudence," Vol. II.

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CORRIGENDA.

READ :—

P. 89, l. 7, *Lord Advocate v. Jaffrey* for *Lord Advocate v. Taffrey*.

P. 405, l. 17, *belonging* for *belong*.

P. 408, l. 27, *destruction* for *distinction*.

P. 442, l. 19, *c. 22* for *c. 221*.

P. 454, l. 1, *on a* for *and*.

To face page 1.

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FOREIGN AND DOMESTIC LAW.

Part I.—PERSONS.

CHAPTER I.

NATIONALITY.

PART I.
PERSONS.

CAP. I.

Nationality
defined.

OF the elements which compose a man's *status*, viewed as a subject of law, nationality is the first and most important. By a man's nationality is meant that political relationship which exists between him and the Sovereign State to which he owes allegiance; and this relationship is fixed, in different countries, by varying laws and principles.

According to the English Common Law, nationality depended not on descent from English ancestors (*jus sanguinis*), but upon the place of a man's birth (*jus soli*), following the feudal principle, which to a certain extent regarded all inhabitants of the soil as appendages to it. The rule of Roman law, which referred all questions of a man's status to that of his parents, was absolutely unrecognised in England until its statutory adoption; and the sole consideration was, whether the individual whose nationality had to be determined was or was not born within the King's allegiance. The only exceptions to this rule were those imposed by public international law, whereby the children of foreign ambassadors were accorded the privilege of extraterritoriality; and the territory of any State, during the hostile occupation of an enemy's army, lost for the time being its national character. With these apparent exceptions, consistent in reality with the rule itself, all who were born on English soil, and no others, were English subjects (*a*).

The first statute to modify this principle was the 25 Edw. 3, st. 2, which provided that "all children inheritors which from

Statutes
regulating
nationality
—birth
abroad.

(*a*) This rule was formerly general throughout Europe. In modern times the tendency of States has been to permit the children of aliens born within their boundaries to follow the nationality of the parents (Germany, Austria, Sweden, Norway, and Switzerland), giving them in some cases the right to elect at majority the nationality of their place of birth (France, Spain, Belgium, Greece, Bolivia, Russia, and Italy). The converse principle, of attributing the nationality of birth unless that of parentage is elected, is the principle followed (with modifications) by Portugal, Denmark, Holland, and (as explained in the text) Great Britain. Hall, *Int. Law* (1917), § 68.

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henceforth shall be born without the legiance of the King of England, whose fathers and mothers at the time of their birth shall be in the faith and legiance of the King, shall have and enjoy the same benefits and advantages, to have and bear the inheritance within the same legiance, as other inheritors aforesaid, in time to come; so always the mothers of such children do pass the sea by the licence and will of their husbands." It will be observed that the privileges of inheritance only (*b*) were conferred by this statute; and it was decided (*c*) that it did not confer even these upon the children of an English mother, by an alien father, born out of the allegiance. Subsequent statutes, however, robbed this decision of any importance. The statute did not even require that the mother should be of English nationality, *Bacon's Case* (*d*) deciding that the alien wife of a British subject was *quasi* under the King's allegiance (*e*).

By 7 Anne, c. 5, s. 3, it was enacted that "the children of all natural-born subjects, born out of the allegiance of her Majesty, her heirs and successors, shall be deemed, adjudged, and taken to be natural-born subjects of this kingdom, to all intents, constructions, and purposes whatsoever." The principle established in *Bacon's Case*, that the transmission of nationality depends upon the father alone, was incorporated with this statute by 4 Geo. 2, c. 21, s. 1. But it was not considered that the words "all intents, constructions, and purposes whatsoever," were large enough to include the power of transmitting such nationality to another generation; and 13 Geo. 3, c. 21 was passed to add this privilege, thus extending the nationality of the grandfather to the second generation born out of the United Kingdom. Children of the third generation, on the same construction of the words of the statute, would of course be still excluded.

Thus both the children and grandchildren born abroad of a natural-born British subject were themselves natural-born British subjects by statute, but his great-grandchildren were not (*f*). In other words, natural-born British subjects included three classes of persons: (1) those born within the dominions, (2) those born abroad of a father who falls within class (1) (7 Anne, c. 5, and 4 Geo. 2, c. 21), and (3) those born abroad of a father who fell

(*b*) But see Lord Bacon's argument in *Calvin's Case* (1608), 2 St. Tr. 585, and Bac. Ab. tit. "Aliens."

(*c*) *Durore v. Jones*, 4 Term Rep. 300.

(*d*) (1641), Cro. Ch. 602.

(*e*) By the Common Law, however, a woman's nationality was unchanged by her marriage: Co. Litt. 31 b; *Countess of Conway's Case* (1834), 2 Knapp, P. C. 368; *Countess de Wall's Case*, 12 Jur. 348.

(*f*) Cockburn on Nationality, pp. 7—10, 94. The report of the Inter-Departmental Committee appointed by the Home Secretary (1901) recommended an alteration in the law, enacting that where the father was born out of the British Dominions, a child also so born should not be a British subject.

within class (2) (13 Geo. 3, c. 21) (*g*). The personal status created by these statutes was, in other words, personal only, and not transmissible (*h*). It might be avoided at the will of the person affected by his making a "declaration of alienage" under s. 4 of the Naturalization Act, 1870 (33 Vict. c. 14).

A naturalized British subject, however, could not transmit his national status to his children born abroad (*i*), but by s. 10 (5) of the Act of 1870, such children if resident in the United Kingdom with the naturalized father or widowed mother were deemed to be naturalized British subjects.

The feudal rule that persons born within the territory of the State (and no other) were subjects of the State was thus enlarged in one direction in favour of British subjects abroad. Until the passing of the Naturalization Act, 1870 (33 Vict. c. 14), it had not been modified in favour of aliens and their children born here; but it was enacted by s. 4 of that statute that any person who was a natural-born subject by reason of being born within the dominions of the Crown, and was also at the time of his birth a subject of a foreign State by the law of such State, might make a declaration of alienage (in manner prescribed) when of full age, and should thereby cease to be a British subject.

Aliens born
in England.

But a natural-born British subject of double nationality cannot by executing a declaration of alienage claim his discharge from the British forces: *Rex v. Commanding Officer Middlesex Regiment, Ex parte Freyberger*, [1917] 2 K. B. 129.

All these statutes have been repealed by the Nationality and Status of Aliens Act, 1914 (4 & 5 Geo. 5, c. 17). Here we have for the first time an attempt to define a natural-born British subject. This attempt, however, has not been entirely successful.

(*g*) The expression "natural-born British subjects" has often been used to denote only those actually born within the realm, *i.e.*, British-born; but in subsequent legislation it is indiscriminately used for the three classes given above. At one time, too, the terms "British subject" and "natural-born British subject" were carefully discriminated. (Cf. *Doe d. Thomas v. Acklam* (1824), 2 B. & C. 779; 2 St. Tr. N. S. 105.) And in the Act of 1870 the distinction between them is kept, though they seem to be occasionally employed in an indiscriminate manner. From the point of view of rights and duties, however, the distinction was practically abolished by that Act.

(*h*) *De Geer v. Stone* (1882), 22 Ch. D. 243, and see authorities there cited. In a later case this statutory nationality in the case of an infant was held sufficient to give the Court jurisdiction to appoint a guardian: *In re Willoughby* (1885), 30 Ch. D. 324 (C. A.).

(*i*) See the judgment of Kay, J., in *In re Bourgeoise*, 41 Ch. D. 310 (1889), and a note on this decision in the *Law Quarterly Review*, vol. iv. p. 226. On affidavits as to the French law, it was held that the father had not ceased to be a subject of France; but there appears to be a *petitio principii* in the reasoning. English law held the naturalisation to be incomplete, because French law regarded the individual as still a French subject. The French law still regarded the individual as a subject only (it appears) if the English naturalization was incomplete. The contention that naturalization was absolutely *prohibited* by French law seems not to be warranted by the affidavits.

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CAP. I.

BRITISH NATIONALITY AND STATUS OF ALIENS
ACT, 1914.

[4 & 5 GEO. 5, c. 17.]

A.D. 1914. An Act to consolidate and amend the Enactments relating to
British Nationality and the Status of Aliens.

[7th August 1914.]

*[Printed (in accordance with s. 3 (3) of 12 & 13 Geo. 5, c. 44), as
amended up to August 4th, 1922, by the British Nationality
and Status of Aliens Acts, 1918 and 1922.]*

BE it enacted by the King's most Excellent Majesty, by and with
the advice and consent of the Lords Spiritual and Temporal, and
Commons, in this present Parliament assembled, and by the
authority of the same, as follows :

PART I.

NATURAL-BORN BRITISH SUBJECTS.

Definition of
natural-
born
British
subject.

Section 1.—(1) The following persons shall be deemed
to be natural-born British subjects, namely :—

- (a) Any person born within His Majesty's dominions
and allegiance; and
- (b) Any person born out of His Majesty's dominions
whose father was, at the time of that person's
birth, a British subject, and who fulfils any of the
following conditions, that is to say, if either—
 - (i) his father was born within His Majesty's
allegiance; or
 - (ii) his father was a person to whom a certi-
ficate of naturalization had been granted; or
 - (iii) his father had become a British subject
by reason of any annexation of territory; or
 - (iv) his father was at the time of that
person's birth in the service of the Crown; or
 - (v) his birth was registered at a British
consulate within one year or in special cir-
cumstances, with the consent of the Secretary

of State, two years after its occurrence, or, in the case of a person born on or after the first day of January, nineteen hundred and fifteen, who would have been a British subject if born before that date, within twelve months after the first day of August, nineteen hundred and twenty-two; and

- (c) Any person born on board a British ship whether in foreign territorial waters or not :

Provided that the child of a British subject, whether that child was born before or after the passing of this Act, shall be deemed to have been born within His Majesty's allegiance if born in a place where by treaty, capitulation, grant, usage, sufferance, or other lawful means, His Majesty exercises jurisdiction over British subjects :

Provided also that any person whose British nationality is conditional upon registration at a British consulate shall cease to be a British subject unless within one year after he attains the age of twenty-one, or within such extended period as may be authorised in special cases by regulations made under this Act—

- (i) he asserts his British nationality by a declaration of retention of British nationality, registered in such manner as may be prescribed by regulations made under this Act; and
- (ii) if he is a subject or citizen of a foreign country under the law of which he can, at the time of asserting his British nationality, divest himself of the nationality of that foreign country by making a declaration of alienage or otherwise, he divests himself of such nationality accordingly.

(2) A person born on board a foreign ship shall not be deemed to be a British subject by reason only that the ship was in British territorial waters at the time of his birth.

(3) Nothing in this section shall, except as otherwise expressly provided, affect the status of any person born before the commencement of this Act.

(4) The certificate of a Secretary of State that a person

was at any date in the service of the Crown shall, for the purposes of this section, be conclusive.

Nationality.—By way of abundant caution it may be pointed out that the term “nationality” is used only in the political sense, since the British Empire having no common civil law, the personal law of a British subject is determined not by his nationality but by his domicile. In those States where the national law prevails throughout their territories the necessity for this distinction does not arise. Political and civil status is synonymous.

The law of British nationality, then, now rests upon the common law and upon the three statutes, viz.:—the British Nationality and Status of Aliens Act, 1914 (4 & 5 Geo. 5, c. 17), which came into operation on 1st January, 1915, which professed to be a consolidating and amending statute, and which repealed a number of former enactments; the Amending Act, 1918 (8 & 9 Geo. 5, c. 38), and the Amending Act, 1922 (12 & 13 Geo. 5, c. 44). These statutes are now officially printed as one statute and cited as the British Nationality and Status of Aliens Acts, 1914 to 1922.

At common law, with certain exceptions to be mentioned later, all persons born within the British dominions are natural-born British subjects. For instance, the child of French parents born during their temporary residence in England is a British subject, and liable to be convicted of high treason if he had taken part in hostile operations against the United Kingdom. See *Aeneas Macdonald's Case*, 18 State Trials, 857 (1747).

(a) *Born within His Majesty's dominions and allegiance.*—It is objected that both these conditions are unnecessary, since a person born in His Majesty's dominions is *ipso facto* born within the King's allegiance. It has been suggested therefore that the draftsman intended to write *or* instead of *and* (a). It is quite clear from paragraphs 6 and 7 of the Report of 1901 that he intended nothing of the kind. The principle of *jus soli* having been retained it was necessary to add the condition *allegiance*. “The rule really is,” say the Commissioners in their Report, “that all persons born ‘within the allegiance’ are subjects of the Crown. Consequently, the child of an alien enemy born in a part of His Majesty's Dominions which is at the time in hostile occupation, is not a British subject” (b).

They also point out that the child born within the British

(a) Grotius Society's Transactions, vol. iv., p. 36.

(b) Report of Nationalisation Laws Committee, 1901.

dominions of an ambassador or other diplomatic agent accredited to the Crown by a foreign Sovereign, is not a British subject.

The addition of the term "within the allegiance" is therefore justified, and indeed it is necessary unless the exceptions to the rule "any person born within the British Dominions is deemed to be a British subject," are expressly stated. This sub-section has proved a puzzle to some English lawyers and the above solution does not appear to have occurred to them (c).

The first exception is merely an extension of the rule laid down in *Calvin's Case* (d), viz.: "If enemies come into any of the King's dominions and surprise any castle or fort and force the same by hostility, and have issue there, that issue is no subject to the King, though he be born within his dominions, for that he was not born under the King's legiance or obedience."

This rule also appears to cover a third class of exceptions. The issue of an alien enemy, imprisoned as a prisoner of war or interned in the dominions or in an allied country, is not a British subject.

It would appear to follow from the decision in *Porter v. Freudenberg* (e) that an enemy alien resident within the King's dominions and demeaning himself peaceably, whether expressly or by implication under the King's protection, will be deemed an alien friend in effect. The issue of such a person would therefore be a British subject. Such was the position of French Protestant refugees resident in England in the seventeenth and eighteenth centuries, during the wars with France (f).

(b) *Born out of His Majesty's Dominions*.—By the Act of 1772 (13 Geo. 3, c. 21), a child born out of the British dominions whose father or whose *grandfather* was born within those dominions was deemed to be a natural-born British subject, provided that his father at the time of his death had not ceased to be a British subject. By the Act of 1914, however, this privilege was taken away from grandchildren born after the 1st January, 1915, outside the British dominions. Such children were not British subjects unless their father had been born within the British dominions, with the exception of those children born in a place where by treaty, capitulation, &c., His Majesty exercised jurisdiction over British subjects. But owing to the agitation by British subjects resident in foreign countries and particularly by those residing in the Argentine—the British colony in Buenos Aires numbers some 30,000—the Act of 1922 was

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(c) See Dicey and Keith, App. Notes 7 and 8. Bentwich in his edition of Westlake's Private International Law has not fallen into this error.

(d) 7 Rep. 18a, 18b.

(e) [1915] 1 K. B. (A. C.) 857.

(f) *Wells v. Williams*, 1 Ld. Raymond, 282; *Sycviater's Case*, 7 Mod. 150.

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carried, which provides as stated above, viz. : that a British subject who has a child born after the 1st January, 1915, may secure British nationality for such child by registering its birth at a British consulate within one year of its birth or within two years in special circumstances, provided that such child on attaining twenty-one shall cease to be a British subject unless within one year, or more in special circumstances, he asserts his British nationality by making a declaration of its retention, and if he is a citizen of a foreign country divests himself of such foreign nationality. Consequently, British subjects, whether natural-born or not, living abroad can extend British nationality to their descendants in perpetuity provided the two conditions comprised in the Act are observed.

In *Carlebach's Case*, [1915] 3 K. B. 716, it was held that under the Act of 1870 a naturalized British subject could not transmit his nationality to his children born abroad, who consequently became aliens. Now by the Act of 1914 such children born abroad after the 1st January, 1915, are deemed to be natural-born subjects. And by (iii) and (iv) of para. (b) of sub-s. (1) the provisions of the common law are enlarged and the children of a father wherever born who, at the time of their birth, had become a British subject by reason of any annexation of territory, or who was in the service of the Crown, are deemed to be natural-born British subjects. Thus the children of the Boers in South Africa and of the Cypriots born after the respective annexations, and the children of Russians born during their service with the British forces in the late war, are British subjects.

British Consulate.—This expression is defined by s. 27 (1). See p. 65, *infra*.

Posthumous Children.—A child of a British subject, born out of the dominions after his father's death, is not a British subject. "Born . . . at the time of that person's death" follows s. 1 of 4 Geo. 2, c. 21, viz. :—"all children born out of the legiance of the Crown . . . whose fathers were or shall be natural-born subjects of the Crown . . . at the time of the birth of such children respectively . . . are hereby declared to be natural-born subjects of the Crown of Great Britain."

Illegitimate Children.—And since British nationality by descent is only attained through the father, the illegitimate child of an Englishwoman born out of the dominions, is not a British subject.

Even if the child becomes legitimated *per subsequens matrimonium*, it does not acquire thereby British nationality (*infra*, Chap. IV., p. 116).

By reason of any annexation of territory.—The tie of allegiance, though spoken of by Coke as *duplex et reciprocum ligamen* involving the duty of obedience on the one hand and protection on the other (g), has always been regarded as capable of dissolution by the will of the Sovereign. Thus allegiance may be dissolved by complete conquest, by cession or by secession recognised by the former Sovereign. Although, however, the Sovereign of the United Kingdom may theoretically cede British territory in virtue of his prerogative by a treaty of peace upon the conclusion of war, it is doubtful whether by such treaty the status of his subjects in the ceded territory is thereby changed (h). Thus prior to the treaty of 1783 with the United States, the Crown was by 22 Geo. 3, c. 46, authorised to cede its revolted colonies to the new Federal States. It is true that the Judicial Committee was of opinion that the Crown in Council had power to cede territory. Nevertheless, the Crown asked Parliament upon the cession of Heligoland to Germany to ratify the treaty by the Anglo-German Agreement Act (53 & 54 Vict. c. 32). Thus upon ratification of the treaty by Parliament, the ceded inhabitants ceased to be British subjects, but whether they thereby become subjects of the new Sovereign is another question, which will be considered later. Whether the Crown has power to alienate British territory, not on the conclusion of war, appeared to Forsyth extremely questionable (i).

A distinction must be drawn between annexation of conquered territory during war and annexation upon the conclusion of war either through the cessation of hostilities or by a treaty of peace. In the former a complete title is not acquired by the conqueror, since so long as hostilities continue, the conquered Government does not relinquish tacitly or expressly its claim to its sovereignty over the conquered territory. Consequently, the population continue to be its subjects and to owe it allegiance. In the latter the conqueror acquires a good title either by the silent submission of the population or by a formal cession of the conquered territory by its former Government.

The mere act of conquest, however complete, does not confer sovereignty upon the conqueror. It has long been held that the adverse possession must be uninterrupted, of long duration and of a permanent character. Such military occupation is usually followed by a treaty of peace whereby the territory is formally ceded. The date of the treaty is usually accepted as that at

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Nationality
—lost by
conquest,
cession or
secession.(g) *Calvin's Case*, 7 Co. 1 and 276 (1608).(h) See *The Parlement Belge*, 5 P. D. 197; *Baird v. Walker*, [1892] A. C. 491.(i) See Forsyth, *Cases and Opinions on Constitutional Law* (1869), pp. 182–6.

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which the change in the national status of the population takes place (k).

This principle was not observed or even mentioned by the Judicial Committee in *Gout v. Cimitian* (l). During the war Cyprus, which had been administered by Great Britain under the suzerainty of the Sultan, was formally annexed to the British dominions by Order in Council, 5th November, 1914, and by a Proclamation of even date Ottoman subjects born in Cyprus and then resident in Cyprus were declared to be British subjects.

This Proclamation was revoked by that of 3rd March, 1915, whereby "All Ottoman subjects resident in Cyprus on November 5, 1914, have become British subjects."

By a later Proclamation of 27th November, 1917, "any Ottoman subject who was ordinarily resident and actually present in Cyprus on November 4th, 1914," was deemed to be a British subject.

The plaintiff was born at Kasseril, in the Ottoman dominions, in 1878 and went to reside in Cairo in 1893. In December, 1913, he went to reside in Cyprus, where he lived twenty-three months. It was held that as the plaintiff Cimitian was "resident" in Cyprus at the date of the annexation, and also "ordinarily resident" within the Order in Council of November, 1917, he was a British subject whether or not Cyprus was then his domicile.

The annexation of Cyprus would appear to have been just as premature as that of the Orange Free State and the South African Republic in 1900 by Great Britain and as that of Tripoli and Cyrenaica in 1911 by Italy.

Although the evidence from general practice is neither convincing nor complete, it is generally accepted, says Professor Berriedail Keith, that the conqueror becomes entitled to the allegiance of all persons actually on the conquered territory at the time of conquest, as decided in *Campbell v. Hall* (1 Cowper, 208), and *United States v. de Repentigny* (5 Wallace, 260) (m). In the latter it is laid down as a rule of public law "that the conqueror who has obtained permanent possession of the enemy's country has a right to forbid the departure of his new subjects or citizens from it and to exercise his sovereign authority over them."

"Permanent possession" is frequently difficult to determine. Mere hostile occupation even for a period of years is not always sufficient. For instance, Hall doubts whether in the circumstances the annexation of Louis Bonaparte's Kingdom of Holland in 1810 to France, which lasted till 1814, was complete. But he

(k) Moore Dig., § 87, p. 291.

(l) [1922] A. C. 105.

(m) Theory of State Succession, 45.

considers that if the conquest is definitely established, it will validate retroactively acts which the conqueror has prematurely done in that capacity (n). Thus the decision in *Gout v. Cimitian* may be justified inasmuch as the British sovereignty was subsequently acknowledged by the Treaty of Sèvres of 10th August, 1920 (o). The Proclamation of 1st September, 1900, annexing the Transvaal, although in the circumstances invalid, was, says Pitt Cobbett, validated by the ultimate issue of the war (p).

The South African Courts have also taken the view that mere forcible annexation does not affect the status of the conquered population. In *Wessels v. Olivier* (1903, O. R. C. Rep. 49), Rose-Innes, C.J., said: "the mere fact of annexation does not make the people living in the annexed country subjects of the annexing State, unless they within a reasonable time show by their conduct or their acts, that they acquiesce in their position to become subjects of the conquering Power."

The question whether subjects of the conquered territory who are not resident at the time of annexation and have not returned subsequently, or who have only returned for temporary purposes, or who left the country before the annexation or immediately afterwards, become subjects of the conqueror, is still a matter of dispute.

The better opinion would appear to be that such persons do not lose their nationality of origin and are not subjects of the conqueror. It is true that in practice this rule has not always been observed. As late as 1866 the Prussian Court convicted Count Platen-Hallemund of high treason committed by him "as a Prussian subject" abroad. The Count was a subject of Hanover and left that State before its annexation by Prussia. Professors Zachariae and Neumann were of opinion that the mere fact of conquest and annexation did not of itself create the relation of sovereign and subject between the conqueror and conquered, and that to create such a relation there must be either an express or tacit submission.

In following this opinion Pitt Cobbett says, "the doctrine of an absolute and unconditional transfer of allegiance by the mere fact of conquest no longer obtains, and the express or implied consent of the subject may now be regarded as essential to the creation of a new tie of personal allegiance" (q).

(n) 7th ed., § 204.

(o) Treaty Series, No. 11, [1920] (Cmd. 964).

(p) Leading Cases, 1924, vol. ii., 362, 4th ed., by Bellot.

(q) Leading Cases, vol. ii., 359. See *Doe d. Thomas v. Acklam*, 2 B. & C. 779 (1824); *Doe d. Auchmuty v. Mulcaster*, 5 B. & C. 777; *In re Bruce*, 1 L. J. (N.S.) Exc. 153 (1832); *Doe v. Arkwright*, 5 C. P. 575 (1833); *The Fama*, 5 C. Rob. 106; *The Manilla*, 1 Edw. 1; *The Pelican*, 1 Edw. App. D.

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Oppenheim, although he agrees that those absent at the date of annexation are not subjects of the conqueror, believes that those present become subjects even if they leave immediately afterwards. Westlake and Halleck, however, maintain that the latter are entitled to opt. To this Oppenheim objects that there is no rule of international law imposing a duty on the conqueror to grant this option (r). But it has been the practice in modern treaties of cession to grant an option to be exercised within a definite period, those exercising the option being allowed to retain their immovable property and to carry with them their movable property to the State for which they have opted (s). Thus the Anglo-German agreement for the cession of Heligoland (July, 1890) reserves to all natives of the ceded territory "the right of opting for British nationality by means of a declaration to be made by themselves, and in the case of children under age, by their parents or guardians, which must be sent in before the 1st January, 1892": Art. xii. (2). It is also provided that all persons, natives of the ceded territory, and their children born before the date of the agreement for cession, shall be free from the obligation of service in the military and naval forces of Germany: Art. xii. (3).

Where no such option has been expressly granted the question may be treated as one of fact. In *Isaacson v. Durant, In re, The Stepney Election Petition* (t), Coleridge, C.J., referred to *Doe d. Thomas v. Acklam*, where the question arose whether the daughter of a man who had been a British subject before the Treaty of Paris, 1783, and but for the treaty would have remained so, was or was not an alien. On the ground that her father had ceased to be a British subject before her birth, it was held that she was. By the treaty the King set free the inhabitants of the United States from their allegiance. "No doubt," said the Chief Justice, "if a man had chosen to leave the States newly recognised as independent and had gone into England or the English dominions, he would have remained what he was before, a British subject, and within the allegiance of the British Sovereign. But why? Because he never became a citizen of the newly established and recognised States."

In *Auchmuty v. Mulcaster* (u), we have the converse. Auchmuty left the United States when the treaty of 1783 was signed. He returned there in the service of the British Government, married and died there. The Court held that, as he had

(r) Oppenheim, vol. i., § 240; Westlake, Papers, 475—89; Halleck, i., 467; vol. ii., 506.

(s) Treaty of Sèvres, Arts. 101—105.

(t) 17 Q. B. D. 54 (1886).

(u) 5 B. & C. 771 (1826).

not remained in the newly made independent country when its independence was conceded, he was still bound by his allegiance to this country. Lord Coleridge denied the doctrine of election. There is, he declared, no right of election. The true doctrine is that allegiance to the Crown of Great Britain cannot be got rid of except by treaty to which the King is a party and by which he relinquishes his claim to that allegiance.

In the case of *Jephson v. Riera* (x), Wall, who had been a British subject, left Minorca within the time limited by the Treaty of Versailles and never afterwards returned.

If this is not election, it is something very similar. The old rule of international law is no doubt that stated by Marshall, C.J., in 1828 in *American Insurance Co. v. Canter* (1 Peters, at p. 542), viz. :—"The same act which transfers their country, transfers the allegiance of them who remain in it." And it was generally held that such transfer was absolute and unconditional and that consequently all the inhabitants became subjects of the conqueror even against their will, and that the conqueror might forbid them to emigrate.

But, says Halleck, the modern interpretation of the rule is more liberal and just. As Bulmerincq remarks, "the end of a just war does not always demand that the conqueror should acquire an absolute and perpetual right of sovereignty over the conquered. It is only a favourable occasion of obtaining it and for that purpose there must be an express or tacit consent of the vanquished" (y).

As Halleck points out, the rule does not say that by the transfer the allegiance of those who after the transfer do not remain is also transferred. He maintains the existence of a right of election.

The transfer of territory, he says, establishes its inhabitants in such a position toward the new sovereignty that they may elect to become or not to become its subjects. Their obligations to the former Government are cancelled, and they may, or may not, become subjects of the new Government, according to their choice. If they remain in the territory after this transfer they are deemed to have elected to become its subjects and then have consented to the transfer of their allegiance to the new sovereignty. If they leave *sine animo revertendi* they are deemed to have elected to continue aliens to the new sovereignty. The *status* of the inhabitants of the conquered and transferred territory is thus determined by their own acts" (z).

Westlake is equally explicit. "Custom," he says, "cannot

(x) 3 Knapp, P. C. 130 (1835).

(y) Droit de la Nat. et de Gens, t. iv., pt. ii., ch. iii.

(z) Vol. ii., 509.

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be invoked to give a conquering State any claim to the allegiance of those who neither expressly nor tacitly accept the new order set up in their country."

"It would be monstrous," he says, "to suppose that the Government or a court of law of the Netherlands could be required to treat ex-President Kruger as a British subject, or would be justified in doing so." He disagrees with Rivier, who declares that the inhabitants of the conquered State cannot emigrate without the licence of the conqueror and without being released from their allegiance (*a*). They must, insists Westlake, have a free option to remain or not. The wider principle of national self-determination was first enunciated by Erasmus in 1517, when he declared that authority over men and beasts is not of the same order, that all power and authority over people rest on their consent and that title by conquest is a fallacy (*b*). In this view he was supported by Grotius (*c*), Puffendorf (*d*), and Vattel (*e*).

This principle was first invoked in 1527 by Francis I. of France and subsequently by his successor, Henry II. With these exceptions there was no deviation from the ancient rule till the French Revolution, except, indeed, that by treaty the right of individual inhabitants of the ceded territory to a certain period within which to choose between the two allegiances, was granted. After the French Revolution the doctrine of self-determination was generally adopted. After having been applied by Prussia it received a severe check at the hands of that Power upon the annexation of Schleswig in 1867, and of Alsace-Lorraine in 1871. Such was the ascendancy acquired by German philosophy at this period that the doctrine became extinct, only however to be revived with renewed vigour during the war of 1914, when it became the vehicle for the national aspirations of every subject nation and race (*f*). It was generally recognised that the old practice of transferring people like cattle was dead. For instance, by the Treaty of Versailles, 1919, the right of self-determination is given to the population of the Saar Basin at the end of fifteen years (*g*). And in a Note of February, 1920, addressed to the Prime Ministers of France and Great Britain, President Wilson declared it to be "the central opinion fought for in the war that no Government or group of Governments has the right to dispose

(*a*) *Principes du Droit des Gens*, 1896, t. 2, 438—9.

(*b*) J. W. Mackail, *Erasmus Against War*, p. 50.

(*c*) *De Jure belli et pacis*, lib. 2, c. 6, ss. 7-8.

(*d*) *Lib.* 8, c. 5, § 9.

(*e*) *Lib.* 1, c. 21, § 263—4.

(*f*) For the history of this movement, see *A Monograph on Plebiscites* by Sarah Wambaugh, 1920; Hyde, *International Law*, 1, §§ 108—9; Bellot's Pitt Cobbett, ii., pp. 358—361.

(*g*) Art. 49.

of the territory or to determine the political allegiance of any free people."

In no case has it been held that any inhabitant of the ceded or separated territory has the right to remain an inhabitant of it and at the same time to retain the allegiance and nationality of the State which ceded or permitted the separation.

The union, temporary or permanent, of two kingdoms under one Sovereign has given rise to the question in a slightly varied form. In *Calvin's Case* (h) it was decided that persons born in Scotland after the accession of James I. to the throne of England (called *postnati*) were not aliens; and the *ratio decidendi* in that case appears to be that allegiance is due to the Sovereign in his natural, and not in his political, capacity. That is to say, the allegiance of the *postnatus* being due to the natural person James, and, James being King of England as well as of Scotland, the allegiance is not due to James as King of Scotland only, but to James as a whole; and the *postnatus* is therefore an English subject. The doctrine is accepted by the judges in *Isaacson v. Durant* (*supra*) to the extent that, so long as the inhabitants of two countries are subjects of the same person, the Court is "not concerned to deny that they are in the allegiance of the same person in his natural, and not in his political, capacity." But so long as the same person remains Sovereign of both countries, the proposition is apparently immaterial, except for the purpose of the actual decision in *Calvin's Case*. As a proposition involving any further practical consequences, it seems to be finally rejected by the Court in *Isaacson v. Durant* (*supra*), the judgment in which, after referring to the feudal character of the relationship between Crown and subject in mediæval times, and to the language of modern legislation, concludes by saying: "The later statutes speak of the Crown, and not the Sovereign, and, to our minds, clearly recognise that to the King, *in his politic, and not in his personal, capacity* is the allegiance of his subjects due" (i). Unquestionably, it would be difficult to support the old feudal theory at the present day, when republics form so considerable a part of the commonwealth of nations and the doctrines of allegiance and nationality have to be applied to Sovereign States whose only character or capacity is political.

The language of Farwell, J., in *Re Johnson* (k) on this subject is perhaps not quite in accordance with the preceding paragraph; but it is to be noted that *Isaacson v. Durant* is not referred to in the judgment. The actual point under consideration was to

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Union under
one Crown—
Calvin's
Case.

(h) 7 Co. 1; 2 St. Tr. 585 (1608).

(i) *Isaacson v. Durant* (1886), 55 L. J. Q. B. at p. 339; 17 Q. B. D. 54.

(k) *In re Johnson, Roberts v. Att.-Gen.* (1903), 19 T. L. R. 309; 1 Ch. 821. See *infra*, pt. ii. c. vii.

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decide what the "law of the nationality" meant when applied by a foreign Court to a British subject born in Malta. The decision that the law of England was the only law which could be so described does not seem open to question. There is no one common law of the Empire; and it cannot be the function of a foreign Court to discriminate between the various British possessions, and to decide which (if any) of them are entitled to claim a nationality of their own. In the case of *Re Johnson*, the Courts of Baden were assumed to refer all questions of the distribution of an intestate's movables to the law of his nationality. If this be the true view of the law of Baden, it is in conflict with the ordinary rule of international jurisprudence, which refers such questions to the *lex domicilii*. According to the ordinary rule, the Baden Court should look to the domicile of the deceased; nor would there be any difficulty in discriminating between the integral parts of the British Empire for the purposes of domicile. But assuming that the Baden Court did refer to the law of the intestate's nationality, and that for this purpose British nationality means English nationality, it must not be taken that this would involve such a consequence as the administration of the estate of a Scotchman, an East Indian, or a Cape Colonial, by the English Statutes of Distribution. On the contrary, the English law as to each of its subjects is that the governing law in such matters is the law of that part of the Empire in which he was domiciled at his death, assuming that he was not domiciled in a foreign State; and this was in effect the rule adopted in *Re Johnson*, so far as the circumstances of the case permitted. It may be here pointed out that some States recognise the domicile of fact—the domicile of international law—in contradistinction to the legal domicile (*l*); but it does not operate in the case of aliens, unless it is perfected by Government authorisation (*m*), in which case it becomes a legal domicile. Thus in *Re Bowes* (*n*) a testator had his domicile of fact in France, but did not possess there a legal domicile; and Swinfen Eady, J., following the decision in *Re Johnson* (*o*), held that the will in question was governed by English law with regard both to its construction and to its administration.

But although the doctrine of *Calvin's Case* is still law, so that, e.g. persons born in Hanover whilst the Georges reigned in England were regarded as of British nationality (*p*), yet the *dicta* in *Calvin's Case* which suggest that upon a subsequent

Subsequent
separation
of united
kingdoms.

(*l*) Cf. the French Civil Code, § 102.

(*m*) *Ibid.* § 13.

(*n*) (1906), 22 T. L. R. 711.

(*o*) (1903), 19 T. L. R. 309.

(*p*) See the judgment in *Isaacson v. Durant* (1886), 17 Q. B. D. 54; 55 L. J. Q. B. 331.

division of the united kingdoms the *postnati* (meaning persons born after and during the union) might owe a double allegiance *ad fidem utriusque Regis*, must now be regarded as incorrect. The actual decision in *Isaacson v. Durant* (*supra*), to which reference has so often been made, was that, as soon as the Crowns of Hanover and England became divided by the accession of Queen Victoria, the Hanoverians ceased to owe allegiance to the British Crown and became aliens; and that those born in Hanover after the separation of the kingdoms were *a fortiori* in the same position. "The Crowns had by accident been united in the same person; but when the union of the Crowns came to an end the union of allegiance ceased too" (*p*).

(c) *Born on board a British ship*.—The term "British ship" includes vessels of the Royal Navy and of the navies of the Dominions, and a ship as defined by s. 1 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), viz. :—

" . . . owned wholly by persons of the following description . . . viz. :

" (a) Natural-born British subjects :

" (b) Persons naturalised by or in pursuance of an Act of Parliament of the United Kingdom or by or in pursuance of an Act or Ordinance of the proper legislative authority in a British possession :

" (c) Persons made denizens by letters of denization; and

" (d) Bodies corporate established under and subject to the laws of some parts of Her Majesty's dominions and having their principal place of business in those dominions :

" Provided that any person who either—

" (i) being a natural-born British subject has taken the oath of allegiance to a foreign sovereign or State or has otherwise become a citizen or subject of a foreign State; or

" (ii) has been naturalised or made a denizen as aforesaid; "shall not be qualified to be an owner of a British ship unless after taking the said oath or becoming a citizen or subject of a foreign State or on or after being naturalized or made a denizen as aforesaid, he has taken the oath of allegiance to Her Majesty the Queen and is during the time he is owner of the ship either resident in Her Majesty's dominions or partner in a firm actually carrying on business in Her Majesty's dominions."

Consequently a person born on board a British ship, whether on the high seas or in foreign territorial waters, is a British subject—

Provided that, under this provision the child of a British

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subject at the time of such child's birth, whether born before or after 7th August, 1914, in a place where the Crown exercises jurisdiction under the Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), is a natural-born British subject. Here it is the *jus sanguinis*, not the *jus soli*, which prevails. Unless the father of the child at the time of its birth is deemed to be a natural-born British subject, the child cannot claim British nationality. "British subject" is defined in s. 27 as "a person who is a natural-born subject, or a person to whom a certificate of naturalization has been granted, or a person who has become a subject of Her Majesty by reason of any annexation of territory."

Born on board a foreign ship.—A "foreign ship" is a vessel not within the purview of s. 1 of the Merchant Shipping Act, 1894—i.e., a vessel which is not a British ship as therein defined. This sub-section is not free from doubt. The more probable construction would appear to be that the mere fact that the ship was within British territorial waters at the time of a person's birth will not confer upon such person British nationality, since the ship, although in fact within the dominions, is not within the allegiance. Such person is regarded as born out of the dominions, and consequently must comply with the provisions of sub-s. (1) (b). His father must either have been born within His Majesty's allegiance or have been naturalized or be in the service of the Crown. If the father is an alien the child is an alien.

Territorial waters are defined by the Territorial Waters Act, 1878 (q), as "such part of the sea adjacent to the coast of the United Kingdom or the coast of some other part of Her Majesty's dominions as is deemed by international law to be within the territorial sovereignty of Her Majesty."

By international law, waters lying *infra fauces terrae*, as well as the open sea within three miles from low-water mark, are regarded as territorial waters, e.g. the Bristol Channel, Hudson Bay, Chesapeake Bay, and the Bay of Cancale.

Born before the commencement of the Act.—As the Act is not, except as otherwise expressly provided, retrospective, the old law applies to those born prior to the commencement of the Act.

PART II.

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NATURALIZATION OF ALIENS.

Section 2.—(1) The Secretary of State may grant a certificate of naturalization to an alien who makes an application for the purpose, and satisfies the Secretary of State—

Certificate of
naturaliza-
tion.

- (a) that he has either resided in His Majesty's dominions for a period of not less than five years in the manner required by this section, or been in the service of the Crown for not less than five years within the last eight years before the application; and
- (b) that he is of good character and has an adequate knowledge of the English language; and
- (c) that he intends if his application is granted either to reside in His Majesty's dominions or to enter or continue in the service of the Crown.

(2) The residence required by this section is residence in the United Kingdom for not less than one year immediately preceding the application, and previous residence, either in the United Kingdom or in some other part of His Majesty's dominions, for a period of four years within the last eight years before the application.

(3) The grant of a certificate of naturalization to any such alien shall be in the absolute discretion of the Secretary of State, and he may, with or without assigning any reason, give or withhold the certificate as he thinks most conducive to the public good, and no appeal shall lie from his decision.

(4) A certificate of naturalization shall not take effect until the applicant has taken the oath of allegiance.

(5) In the case of a woman who was a British subject previously to her marriage to an alien, and whose husband has died or whose marriage has been dissolved, the requirements of this section as to residence shall not apply and the Secretary of State may in any other special case, if he thinks fit, grant a certificate of naturalization,

although the four years' residence or five years' service has not been within the last eight years before the application.

(6) For the purposes of this section a period spent in the service of the Crown may, if the Secretary of State thinks fit, be treated as equivalent to a period of residence in the United Kingdom.

Nationality acquired by naturalization.—The acquisition of British nationality by naturalization is regulated by this Part of the Act. In order to obtain a certificate of naturalization, it will be seen that an alien must have resided in His Majesty's dominions for not less than five years in the manner required by the section or have been in the service of the Crown for not less than five years within the last eight years before the application, and in either case has taken the oath of allegiance.

May grant a certificate.—The grant of a certificate lies in the absolute discretion of the Secretary of State for Home Affairs, or, if he is unable to act, of any of H.M.'s principal Secretaries of State (a).

But s. 3 (2) of the British Nationality and Status of Aliens Act, 1918 (8 & 9 Geo. 5, c. 38), provides that "No certificate of naturalization shall before the expiration of a period of ten years after the termination of the present war, be granted in the United Kingdom to any subject of a country which at the time of the passing of this Act was at war with His Majesty, but this provision shall not apply to a person who

- (a) has served in H.M.'s forces or in the forces of H.M.'s allies or of any country acting in naval or military co-operation with His Majesty; or
- (b) is a member of a race or community known to be opposed to the enemy Governments; or
- (c) was at birth a British subject."

The late war terminated on 31st August, 1921.

Nationals of territories which have become detached from the former enemy States and have either become independent or incorporated in other States, are not within the above provision. For instance, Poles formerly nationals of German and Austrian Poland and Czechs formerly nationals of the Austrian Empire are eligible for naturalization here.

It might not in every case be easy to determine when a race or community was opposed to the former enemy Governments,

(a) See s. 12 (3) of the Interpretation Act, 1889.

but the expression "former enemy aliens" has been defined by s. 15 of the Aliens Restrictions (Amendment) Act, 1919 (*b*), as "an alien who is a subject or citizen of the German Empire or any component State thereof or of Austria, Hungary, Bulgaria, or Turkey, or who having at any time been such subject or citizen has not changed his allegiance as a result of the recognition of new States or territorial rearrangements or been naturalized in any other foreign State or in any British possession in accordance with the laws thereof and when actually resident therein and does not retain according to the law of his State of origin the nationality of that State."

Certificates of Naturalization.—The fees for grant of certificate and registration to be paid in Great Britain are fixed by Reg. 14 : see p. 75, *infra*. A list of persons to whom certificates of naturalization or re-admission to British nationality have been granted during each month in the year is published in the *London Gazette* early in the month following.

As to the mode of proving certificates, declarations of alienage, &c., see s. 21 of the Act, and Reg. 12, at p. 74, *infra*. For forms of certificates of naturalization, see Reg. 1, at p. 67, *infra*.

Oath of allegiance.—By s. 24 this must be taken in the form set out in the Second Schedule to the Act. The certificate is ineffective until the oath has been taken.

But by s. 1 of the Oaths Act, 1888 (51 & 52 Vict. c. 46), a person is entitled to affirm instead of taking the oath. In *Towler v. Sutton* (*c*) Towler upon presenting himself for enlistment under the Derby scheme of voluntary service, declared himself an atheist and claimed the right to affirm. The recruiting officer refused, upon the ground that unless the oath of allegiance was taken he would not be properly enlisted. The appellant, said Brading, C.J., was clearly entitled in law to make an affirmation instead of the oath, and since his services had not been accepted through no fault of his own, he could not be made a compulsory recruit. Consequently his services were lost to the Crown.

By s. 5 of the Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), a person who knowingly and wilfully makes a statement false in a material particular in a statutory declaration is guilty of a misdemeanour and is liable to imprisonment with or without hard labour not exceeding two years or to a fine or to both.

The persons who may administer the oath are defined in Reg. 10 (1), at p. 74, *infra*. The oath must not only be taken

(b) 9 & 10 Geo. 5, c. 92.

(c) 86 L. J. K. B. 46 (1917).

but also subscribed, and by Reg. 11 it must be taken within one calendar month after the oath of the certificate of naturalization or within such extended time as may be granted.

By Reg. 9 certificates of naturalization granted in the United Kingdom and oaths of allegiance relating thereto must be registered in London at the Home Office, and those granted in a British possession (other than India or a Dominion) must be registered both in London and in the possession. See p. 73, *infra*.

Section 3.—(1) A person to whom a certificate of naturalization is granted by a Secretary of State shall, subject to the provisions of this Act, be entitled to all political and other rights, powers, and privileges, and be subject to all obligations, duties, and liabilities, to which a natural-born British subject is entitled or subject, and, as from the date of his naturalization, have to all intents and purposes the status of a natural-born British subject.

(2) Section 3 of the Act of Settlement (which disqualifies naturalized aliens from holding certain offices) shall have effect as if the words “naturalized or” were omitted therefrom.

Subject to the provisions of this Act.—A natural-born subject cannot be deprived of his status, but by s. 7, a naturalized subject may be deprived of his status of a natural-born subject upon the commission of the offences specified therein (*infra*, p. 28).

By s. 1 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), a naturalized subject or denizen is not “qualified to be owner of a British ship unless . . . he has taken the oath of allegiance to Her Majesty the Queen and is during the time he is owner of the ship either resident in Her Majesty’s dominions or partner in a firm actually carrying on business in Her Majesty’s dominions.”

It has been doubted whether a naturalized subject is a natural-born subject within the meaning of the Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93) (*d*).

“*All political and other rights.*”—These words impliedly repeal, *quoad* persons naturalized under this Act, the restrictions imposed by 12 & 13 Will. 3, c. 2, s. 3; which enacted that neither naturalized persons nor persons made denizens should be capable

(d) See Dicey & Keith, pp. 191, 305.

of entering the Privy Council, nor of becoming a member of either House of Parliament, nor of any place or office of trust, nor to take any grant from the Crown. When naturalization was effected by an Act of Parliament, it was usual in the case of any distinguished foreigner to repeal the 12 & 13 Will. 3, c. 2, s. 3 (and also the 1 Geo. 1, st. 2, c. 4), so far as he was concerned. The above restrictions are still operative as regards denizens; and denization by letters patent therefore, though preserved by s. 25, is likely to fall into disuse.

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Act of Settlement.—Prior to this Act an alien could not be a member of Parliament nor could he possess the parliamentary franchise. He could, however, be a Privy Councillor, since the Sovereign was not restricted at common law or by statute in his choice of Councillors. But upon naturalization he acquired all the rights, privileges and capacities of a natural-born British subject.

By s. 3 of the Act of Settlement, 1700, however “No person born out of the Kingdoms of England, Scotland or Ireland, or the dominions thereunto belonging (although he be naturalized or made a denizen, except such as are born of English parents), shall be capable to be of the Privy Council or a member of either House of Parliament or to enjoy any office or place of trust either civil or military or to have any grant of lands, tenements or hereditaments from the Crown, to himself or to any other or others in trust for him.” That is to say, persons born abroad, even though naturalized, were excluded from the offices mentioned, unless they are born of English parents.

By s. 6 of the Act of 1844 (7 & 8 Vict. c. 66), a naturalized alien became entitled to all the rights, privileges and capacities of a natural-born subject except becoming a Privy Councillor or a member of Parliament.

By the Naturalization Act of 1870 an alien who had resided in the United Kingdom for a term of not less than five years or had been in the service of the Crown for a like period might apply for a certificate of naturalization. Upon the grant of such certificate he became entitled to all the political rights, powers, and privileges, and subject to all the obligations, of a natural-born British subject, but he was not to be deemed a British subject unless he had ceased to be a subject of his former State. The certificate did not take effect until the applicant had taken the oath of allegiance.

Although the Act stopped short of expressly declaring that naturalized aliens should be deemed to be natural-born British subjects, it seems clear that such was the intention. Such was the interpretation placed upon the section in *Rex v. Speyer*,

[1916] 1 K. B. 595; [1916] 2 K. B. 858; in which it was sought to exclude the defendant from the Privy Council on the ground that he was disqualified as a naturalized alien for that office by the Act of Settlement of 1700.

By s. 3 of the Act of Settlement, however, no person born out of the realm or dominions (although naturalized or a denizen, except of English parents) was eligible to the Privy Council or either House of Parliament or to certain specified offices.

By s. 3 of the Act of 1914, a person to whom a certificate of naturalization is granted, subject to the provisions of the Act, is entitled to all political and other rights, powers, and privileges and subject to all obligations, duties and liabilities to which a natural-born British subject is entitled or subject, and as from the date of his naturalization to have to all intents and purposes the status of a natural-born British subject.

It was further provided by this section that "Section 3 of the Act of Settlement (which disqualifies naturalized aliens from holding certain offices) shall have effect as if the words 'naturalized or' were omitted therefrom."

It was held therefore that s. 3 of the Act of Settlement was repealed by implication by s. 7 of the Act of 1870 *quoad* naturalized aliens; that s. 3 of the Act of 1914 had not revived *quoad* naturalized aliens the disqualification for membership of the Privy Council contained in the Act of Settlement; and that Sir Edgar Speyer upon naturalization was capable of being a Privy Councillor. The Court expressed the view that the wording of the statute was not very happy. The disqualification, however, of denizens still continues and for this reason denization by letters patent, though preserved by s. 25 of the Act of 1914, is likely to fall into disuse.

Where naturalization was effected by Act of Parliament it was usual in the case of any distinguished foreigner to repeal s. 3 of the Act of Settlement, so far as he was concerned.

The grant of a certificate of naturalization lies in the absolute discretion of the Secretary of State. He may make such grant if he is satisfied that the applicant has either resided within the British dominions for a term of not less than five years, or been in the service of the Crown for a like term; is of good character and has an adequate knowledge of the English language; and intends to reside in the British dominions or enter or continue in the service of the Crown. The residence prescribed is residence in the United Kingdom for not less than one year and previous residence either in the United Kingdom or in some other part of the British dominions for a period of four years within the last

eight years before the application. A certificate has no effect until the applicant has taken the oath of allegiance.

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Section 4. The Secretary of State may, in his absolute discretion, in such cases as he thinks fit, grant a special certificate of naturalization to any person with respect to whose nationality as a British subject a doubt exists, and he may specify in the certificate that the grant thereof is made for the purpose of quieting doubts as to the right of the person to be a British subject, and the grant of such a special certificate shall not be deemed to be any admission that the person to whom it was granted was not previously a British subject.

Special
certificate in
case of
doubt.

This section re-enacts the similar provision contained in s. 7 of the Act of 1870. The grant of such certificate is not to be deemed any admission that the person to whom it is granted was not prior to such grant a British subject. Consequently such certificate will not be received as proof that such person was a British subject prior to such grant.

For the form of the special certificate, see Reg. 2, at p. 69, *infra*.

Section 5.—(1) Where an alien obtains a certificate of naturalization, the Secretary of State may, if he thinks fit, on the application of that alien, include in the certificate the name of any child of the alien born before the date of the certificate and being a minor, and that child shall thereupon, if not already a British subject, become a British subject; but any such child may, within one year after attaining his majority, make a declaration of alienage, and shall thereupon cease to be a British subject

Persons
under dis-
ability.

(2) The Secretary of State may, in his absolute discretion in any special case in which he thinks fit, grant a certificate of naturalization to any minor, whether or not the conditions required by this Act have been complied with.

(3) Except as provided by this Act, a certificate of naturalization shall not be granted to any person under disability.

This provision is in substitution for sub-s. (5) of s. 10 of the Act of 1870, the construction of which gave rise to many

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difficulties. It is now clear that the child of an alien born before the application for a certificate is not a British subject unless his name is included in such application or unless he happened to come within the provisions of s. 1 of the principal Act. It should be noted that such child, even if included in the certificate, does not become a British subject until the alien has taken the oath of allegiance. Until such event the certificate is inoperative.

Sub-s. (5) of s. 10 of the Act of 1870 provided that "when the father or the mother being a widow has obtained a certificate of naturalization in the United Kingdom every child of such father or mother who during infancy has become resident with such father or mother in any part of the United Kingdom, shall be deemed to be a naturalized British subject."

It was stated by Kay, J., in *Re Bourgeoise* (e) as his opinion that a certificate of naturalization did not give the power of transmitting nationality to the descendants of the holder of the certificate. The Court of Appeal, in dismissing the appeal, declined to discuss this point and left it unanswered. But in *Rex v. Albany Street Police Station Superintendent* (f), the Divisional Court held that a child born in a foreign State prior to the commencement of the principal Act did not obtain the status of a British subject by the mere fact that his father was a naturalized British subject. In this case the father was a German who became naturalized in England in 1869, and also took out a certificate of naturalization in 1877. The son was born at Frankfort in 1884 and resided on the Continent till 1909, when he came to England. As Lush, J., pointed out, there is nothing in the Act of 1844 or in the Act of 1870 which confers any status upon the child of a naturalized person, where that child has been born in a foreign country.

In *Jaffé v. Keel* (g) Jaffé's father came to England in 1839, where he became naturalized in 1854, returning to Germany in 1856 and dying at Nuremberg in 1887. The son was born in that city in 1875. In 1890 his mother came to reside in England, but never obtained a certificate of naturalization under sub-s. (5). From 1893 the son, then eighteen years of age, resided with his mother for one year. It was held by the Divisional Court that, even assuming that Jaffé's father became entitled to all the privileges of the Act of 1870, Jaffé did not acquire the status of a British subject under sub-s. (5), since, although his mother, by virtue of her husband's naturalization, had become entitled to the rights and privileges of a British subject, she had not obtained

(e) 41 Ch. D. 310.

(f) [1915] 3 K. B. 716.

(g) [1916] 2 K. B. 476.

a certificate of naturalization in the United Kingdom. Consequently Jaffé was an alien.

In *Agdesham v. Hunt* (1917), 86 L. J. K. B. 1334, the father of the appellant, David Agdesham, on 4th April, 1913, obtained a certificate of naturalization in which his son David, aged fourteen years, was included. In August, 1915, the appellant in a form signed by him in pursuance of the National Registration Act, 1915, described himself as "Russian, naturalized British." By mistake in the registration card he was described as "Russian." Upon his application to the respondent for registration under the Aliens' Restriction Act, 1914, and Reg. 19 of the Aliens' Restriction (Consolidation) Order, 1916, he described himself as of Russian nationality. He was convicted by the magistrate of furnishing false particulars in order to obtain exemption from service with the British forces. Upon appeal the conviction was upheld by the Divisional Court, which found that the appellant was of British nationality and had wilfully given false particulars in order to evade military service.

For the form of a certificate to a minor, sub-s. 2, see Reg. 3, at p. 69, *infra*.

Section 6. An alien who has been naturalized before the passing of this Act may apply to the Secretary of State for a certificate of naturalization under this Act, and the Secretary of State may grant to him a certificate on such terms and conditions as he may think fit.

Persons
previously
naturalized.

This section gives somewhat wider discretionary powers to the Secretary of State than those contained in the corresponding provision of s. 7 of the Act of 1870.

In exceptional cases an alien may be naturalized by private Act of Parliament. The rights thus granted and the disabilities imposed depend on the terms of the particular enactment (*h*). A Naturalization Bill must be first introduced in the House of Lords, but must be preceded by a petition, with a copy of the proposed Bill attached, for leave to bring in the Bill (*i*). Before the Bill is read a second time, the consent of the Crown must be obtained, and the petitioner must produce a certificate of good conduct from the Secretary of State, and take the oath of allegiance at the bar of the House (*k*).

Nationality
acquired by
private Act
of Parlia-
ment.

For the form of the certificate, see Reg. 4, at p. 70, *infra*.

(*h*) For precedents, see Encyclopædia of Forms, vol. ix., pp. 31-2.

(*i*) Standing Orders H. L. 149-51.

(*k*) *Ibid.*, 179-80.

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 Revocation
of certificate
of naturaliza-
tion.

Section 7.—(1) Where the Secretary of State is satisfied that a certificate of naturalization granted by him has been obtained by false representation or fraud, or by concealment of material circumstances, or that the person to whom the certificate is granted has shown himself by act or speech to be disaffected or disloyal to His Majesty, the Secretary of State shall by order revoke the certificate.

(2) Without prejudice to the foregoing provisions the Secretary of State shall by order revoke a certificate of naturalization granted by him in any case in which he is satisfied that the person to whom the certificate was granted either—

- (a) has during any war in which His Majesty is engaged unlawfully traded or communicated with the enemy or with the subject of an enemy state, or been engaged in or associated with any business which is to his knowledge carried on in such manner as to assist the enemy in such war; or
- (b) has within five years of the date of the grant of the certificate been sentenced by any court in His Majesty's dominions to imprisonment for a term of not less than twelve months, or to a term of penal servitude, or to a fine of not less than one hundred pounds; or
- (c) was not of good character at the date of the grant of the certificate; or
- (d) has since the date of the grant of the certificate been for a period of not less than seven years ordinarily resident out of His Majesty's dominions otherwise than as a representative of a British subject, firm, or company carrying on business, or an institution established, in His Majesty's dominions, or in the service of the Crown, and has not maintained substantial connection with His Majesty's dominions; or
- (e) remains according to the law of a state at war with His Majesty a subject of that state;

and that (in any case) the continuance of the certificate is not conducive to the public good.

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(3) The Secretary of State may, if he thinks fit, before making an order under this section refer the case for such inquiry as is hereinafter specified, and in any case to which subsection (1) or paragraph (a), (c), or (e) of subsection (2) of this section applies, the Secretary of State shall, by notice given to or sent to the last-known address of the holder of the certificate, give him an opportunity of claiming that the case be referred for such inquiry, and if the holder so claims in accordance with the notice the Secretary of State shall refer the case for inquiry accordingly.

(4) An inquiry under this section shall be held by a committee constituted for the purpose by the Secretary of State, presided over by a person (appointed by the Secretary of State with the approval of the Lord Chancellor) who holds or has held high judicial office, and shall be conducted in such manner as the Secretary of State may direct :

Provided that any such inquiry may, if the Secretary of State thinks fit, instead of being held as aforesaid be held by the High Court, and the practice and procedure on any inquiry so held shall be regulated by rules of court.

A committee appointed under this section shall have all such powers, rights, and privileges as are vested in the High Court or in any judge thereof on the occasion of any action in respect of the following matters :—

(a) the enforcing the attendance of witnesses and examining them on oath, affirmation, or otherwise, and the issue of a commission or a request to examine witnesses abroad ; and

(b) the compelling the production of documents ; and

(c) the punishing persons guilty of contempt ;

and a summons signed by one or more members of the committee may be substituted for and shall be equivalent to any formal process capable of being issued in any action for enforcing the attendance of witnesses and compelling the production of documents.

(5) Where a person to whom a certificate of naturalization has been granted in some other part of His Majesty's dominions is resident in the United Kingdom, the certificate may be revoked in accordance with this section by the Secretary of State, with the concurrence of the Government of that part of His Majesty's dominions in which the certificate was granted.

(6) Where the Secretary of States revokes a certificate of naturalization, the revocation shall have effect from such date as the Secretary of State may direct, and thereupon the certificate shall be given up and cancelled, and any person refusing or neglecting to give up his certificate shall be liable on summary conviction to a fine not exceeding one hundred pounds.

False representation or fraud.—Under the Act of 1870 a certificate of naturalization when once granted was irrevocable. The Act failed to provide for its withdrawal, even if obtained by fraudulent misrepresentation or upon false evidence. The Naturalization Laws Committee reported that certificates were frequently obtained by a fraudulent statement of the applicant. He either, for instance, did not in fact reside in the United Kingdom or had no intention to reside there (1).

Although the status of a naturalized person has been raised to an equality, in general terms, with that of a natural-born subject, yet in other respects it has been substantially modified to his disadvantage. By this section absolute discretion has been conferred upon the Secretary of State to revoke the certificate of naturalization if he is satisfied that the certificate has been obtained by false representation or fraud, or by concealment of material circumstances, or that the person to whom the certificate has been granted has shown himself by act or speech to be disaffected or disloyal. Such act may be indicated by the naturalized person who (a) during war has unlawfully traded or communicated with the enemy or with the subject of an enemy State or engaged in or associated with any business so as to assist the enemy; or (b) has within five years of the grant of the certificate been sentenced by any Court in His Majesty's dominions, or (c) was not of good character at the date of the grant of the certificate; or (d) has been ordinarily resident out of His Majesty's dominions not less than seven years since the grant, without maintaining substantial connection with such

(1) Report of Naturalization Laws Committee, para. 24.

dominions; or (e) remains according to the law of the State at war a subject of that State. A person refusing or neglecting to deliver up his certificate after revocation is liable to a fine not exceeding one hundred pounds.

Disaffection and disloyalty are vague terms, and may be compared with the obsolete doctrine of constructive treason. The provisions relating to a clean record and good character prior to the grant as conditions of the retention of the status of a British subject are new in English law. A clean record is quite a reasonable requirement. Every State is entitled to reject persons convicted of serious criminal offences. But "good character" is too vague and capable of causing injustice. Referring to these provisions Mr. Bentwich says, experience alone will show whether it will be desirable to retain the idea of nationality conditional on good behaviour and on keeping in close touch with the British dominions as a permanent variety of citizenship.

The revocation of a certificate does not affect the status of the wife and minor children unless the Secretary of State otherwise expressly directs. But the wife may make a declaration of alienage, whereupon she and the children cease to be British citizens. If, however, the wife is a natural-born British subject the Secretary of State may not direct revocation of her status.

Section 7A.—(1) Where a certificate of naturalization is revoked the Secretary of State may by order direct that the wife and minor children (or any of them) of the person whose certificate is revoked shall cease to be British subjects, and any such person shall thereupon become an alien; but except where the Secretary of State directs as aforesaid, the nationality of the wife and minor children of the person whose certificate is revoked shall not be affected by the revocation, and they shall remain British subjects:

Effect of
revocation of
certificate
of natural-
ization.

Provided that—

- (a) it shall be lawful for the wife of any such person within six months after the date of the order of revocation to make a declaration of alienage, and thereupon she and any minor children of her husband and herself shall cease to be British subjects and shall become aliens; and
- (b) the Secretary of State shall not make any such order as aforesaid in the case of a wife who

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was at birth a British subject, unless he is satisfied that if she had held a certificate of naturalization in her own right the certificate could probably have been revoked under this Act, and the provisions of this Act as to referring cases for inquiry shall apply to the making of any such order as they apply to the revocation of a certificate.

(2) The provisions of this section shall, as respects persons affected thereby, have effect in substitution for any other provisions of this Act as to the effect upon the wife and children of any person where the person ceases to be a British subject and such other provisions shall accordingly not apply in any such case.

(3) Where a certificate of naturalization is revoked the former holder thereof shall be regarded as an alien and as a subject of the state to which he belonged at the time the certificate was granted.

Wife and minor children.—By this section the wife and minor children, although all British born, may be deprived of their British nationality, an innovation upon the general rule introduced by the Act of 1918. In the case of the wife, however, it is provided that if she is a natural-born British subject, she shall retain her British nationality unless grounds exist upon which, had she been naturalized by a certificate, such certificate might be revoked. If she is included in the order of revocation she is entitled to an inquiry under s. 7 (4).

If the wife is not included in the order of revocation, she remains a British subject, unless she avails herself of the right to make a declaration of alienage conferred by the proviso within six months of the order of revocation, in which case she and any minor children of her husband and herself cease to be British subjects and become aliens.

Power of
Governments
of British
possessions
to grant
certificates
of Imperial
naturaliza-
tion.

Section 8.—(1) The Government of any British Possession shall have the same power to grant a certificate of naturalization as the Secretary of State has under this Act, and the provisions of this Act as to the grant and revocation of such a certificate shall apply accordingly, with the substitution of the Government of the Possession for the Secretary of State, and the Possession for the United

Kingdom and of a High Court or superior court of the Possession for the High Court, and with the omission of any reference to the approval of the Lord Chancellor, and also, in a Possession where any language is recognised as on an equality with the English language, with the substitution of the English language or that language for the English language :

Provided that, in any British Possession other than British India and a Dominion specified in the First Schedule to this Act, the powers of the Government of the Possession under this section shall be exercised by the Governor or a person acting under his authority, but shall be subject in each case to the approval of the Secretary of State, and any certificate proposed to be granted and any proposal to revoke any certificate shall be submitted to him for his approval.

(2) Any certificate of naturalization granted under this section shall have the same effect as a certificate of naturalization granted by the Secretary of State under this Act.

Imperial naturalization.—By complying with the provisions relating to naturalization contained in the principal Act, the Government of any British possession may confer upon aliens residing in its territory Imperial naturalization, *i.e.*, the status of a natural-born British subject in any part of the British Empire. The powers of the British Secretary of State may be exercised by such Government upon the same terms *mutatis mutandis*, and in those possessions in which another language is officially recognised with English, an adequate knowledge of either language may be accepted. The Dominions of Canada, Australia and Newfoundland have adopted this Part of the principal Act. But where a possession has not adopted the Act a person naturalized by the Government of such possession is not a British subject within the United Kingdom. This point was raised during the late war under the Act of 1870, by which the Legislature of a British possession was empowered to make laws “for imparting to any person the privileges or any of the privileges of naturalization to be enjoyed by such person within the limits of such possession.

In *Rex v. Francis, Ex parte Markwald*, [1918] 1 K. B. 617, Markwald was born in Germany in 1859, and in 1878 went to Australia, where, in 1908, he took the oath of allegiance and

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was granted a certificate of naturalization under the Australian Act, 1903. He subsequently came to reside in London and was charged and convicted of being an alien. It was held that taking the oath of allegiance and the grant of a certificate did not make Markwald a British subject in the United Kingdom.

“A man,” said Darling, J., “may become the liege subject of the King in some parts of his dominions yet not in all; and wherever he is not a subject, he is an alien.” As was said, Markwald’s allegiance was local allegiance. No authority had been given by the sovereign power to anyone to accept any wider allegiance from him. When every British possession has adopted the Act, this partial British citizenship will cease to exist. In the meantime the anomaly remains, since a possession may admit aliens to its citizenship upon terms which are not acceptable in the United Kingdom (*m*).

Subject in each case to the approval of the Secretary of State.—It will be noted that in the case of any British possession, other than British India and the dominions, the powers under this section are to be exercised by the Governor or his deputy, and are subject to the approval of the British Secretary of State. This substantially re-enacts s. 16 of the Act of 1870, whereby the power of colonies to legislate with respect to naturalization was subject to confirmation or disallowance by the Crown, in the same manner as the confirmation or disallowance of any other laws, statutes or ordinances of a British possession. Residence in a possession is substituted for residence in the United Kingdom.

By s. 9 of the principal Act it will be seen that this Part of the Act has no effect within the dominions, unless this Part of the Act is adopted by dominion legislation. The dominions specified in the Schedule are Canada, Australia (including Papua and Norfolk Island), New Zealand, South Africa and Newfoundland.

The intention of the Imperial Legislature was on the one hand to establish the status of an Imperial naturalization which should prevail throughout the British Commonwealth and be recognised by all foreign States, and on the other to preserve the rights hitherto exercised by the Governments of British possessions of deciding the conditions upon which naturalization operative within their respective territories should be granted. Accordingly s. 26 (2) of the principal Act expressly enacts that “All laws, statutes and ordinances made by the Legislature of a British possession for imparting to any person any of the privileges of naturalization to be enjoyed by him within the limits of that possession shall within their limits have the authority of law.”

(*m*) See *Markwald v. Att.-Gen.*, [1920] 1 Ch. 348.

Section 9.—(1) This Part of this Act shall not, nor shall any certificate of naturalization granted thereunder, have effect within any of the Dominions specified in the First Schedule to this Act, unless the Legislature of that Dominion adopts this Part of this Act.

(2) Where the Legislature of any such Dominion has adopted this Part of this Act, the Government of the Dominion shall have the like powers to make regulations with respect to certificates of naturalization and to oaths of allegiance as are conferred by this Act on the Secretary of State.

(3) The Legislature of any such Dominion which adopts this Part of this Act may provide how and by what Department of the Government the powers conferred by this Part of this Act on the Government of a British Possession are to be exercised.

(4) The Legislature of any such Dominion may at any time rescind the adoption of this Part of this Act, provided that no such rescission shall prejudicially affect any legal rights existing at the time of such rescission.

Certificate of Naturalization.—Naturalization within the United Kingdom under this Part of the Act has no effect within the dominions unless such dominions through their Legislatures adopt it. Canada, Australia and Newfoundland have adopted Part II. of the Act.

PART III.

GENERAL.

National Status of Married Women and Infant Children.

Section 10. The wife of a British subject shall be deemed to be a British subject, and the wife of an alien shall be deemed to be an alien: Provided that where a man ceases during the continuance of his marriage to be a British subject it shall be lawful for his wife to make a declaration that she desires to retain British nationality, and thereupon she shall be deemed to remain a British subject, and provided that where an alien is a subject of a

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Application
of Part II. to
Self-
Governing
Dominions.

National
status of
married
women.

state at war with His Majesty it shall be lawful for his wife if she was at birth a British subject to make a declaration that she desires to resume British nationality, and thereupon the Secretary of State, if he is satisfied that it is desirable that she be permitted to do so, may grant her a certificate of naturalization.

Wife of a British subject.—Under s. 10 of the Act of 1870 (re-enacting s. 16 of the Act of 1844) a married woman was deemed to be a subject of the State of which her husband for the time being was a subject. The rule generally accepted was that the wife acquired the nationality of her husband provided the law of her husband's State so determined. By the English common law an alien wife of a British subject did not acquire British nationality and this was the law until the statute of 1844.

By s. 10 of the Act of 1914 the alien wife of a British subject becomes a British subject, and, upon the same principle, a woman of British nationality upon marriage with an alien becomes an alien. Formerly, the latter by the common law retained her British nationality.

In one respect this section is open to grave objection. The result is that if a British woman marries a stateless person, she also becomes stateless. Under the common law a British woman upon marrying an alien retained her British nationality, and this was not affected by the Act of 1844. By the Act of 1870, however, upon marriage with an alien she became the subject of the State of which her husband was a subject. In the Bill introduced by Sir John Butcher (now Lord Daneport) in 1923, it was provided that women should be entitled to retain their British nationality upon marriage with an alien. This proposal was supported by numerous women's associations throughout the Empire. A Select Committee of the two Houses of Parliament was appointed in May, 1923, to examine the British law as to the nationality of married women, to consider in their legal and practical aspects the questions involved in the possession by the husband and wife of the same or of different nationalities, and with due regard thereto and to the operation of the laws of foreign countries to report what, if any, alteration of the British law is desirable. After taking evidence the Committee unfortunately was equally divided, the members of the House of Lords presenting one report and the members of the House of Commons another. The Lords, however, whilst rejecting the wider proposal of the Bill, declared the position of statelessness to be undesirable and suggested an amendment to the effect that a woman shall not lose her original nationality if she does not

acquire that of her husband under the law of his country. This, however, does not fully meet the case of statelessness, since if the husband has no country, the proposed amendment would be inoperative. It would meet the difficulty created by the American statute of 1922, known as the Cable Act, whereby an alien woman marrying an American citizen does not acquire American citizenship, although an American woman upon marriage with an alien remains a subject of the United States unless she renounces her nationality. In England no attention was paid to this question until, in *Ex parte Weber* (n), Phillimore, L.J., doubted whether a person could be stateless. But in *Stoeck v. Public Trustee* (o), Russell, J., recognised the existence of statelessness as a legal fact in English law.

In their report the Lords laid great stress upon maintaining the harmony of the family. The possession by husband and wife of different nationalities would in their opinion produce in a great many cases domestic unhappiness for the wife, the husband and the children. The proposed change would result in some women having a double nationality and in others being stateless. For instance, a British woman marrying a German would retain her British nationality and under German law would take the nationality of her German husband; conversely, a German woman marrying an Englishman would under German law lose her German nationality and would not by her marriage acquire British nationality. It was feared by the Foreign Office representatives that the proposed change would lead inevitably to a demand for a change in regard to the nationality of the children, which at present universally follows the nationality of the parents. Both they and the Home Office representatives impressed upon the Committee the grave inconveniences which would attend such a drastic change in law. They pointed out that the principle at present recognised in English law is in accord with that accepted by nearly all countries and consequently avoids conflicts of jurisdiction with the laws of those countries.

On the other hand the members of the House of Commons in their report denied that the proposed change would impair the harmony of the family. English law now recognised the separate individuality of husband and wife both in relation to status and property. It was true that differences of religion and even of politics might lead to serious disturbance of the matrimonial harmony. But a woman can no more be compelled on her marriage to surrender her national sentiment than she can be compelled to surrender her religion. It appeared therefore

(n) [1916] 1 K. B. 280, n.; [1916] A. C. 421.
(o) [1921] 2 Ch. 67.

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unreasonable in the interests of matrimonial harmony to compel a woman on marriage to surrender her nationality when she cannot be compelled to surrender her national sentiment. With regard to children no demand had yet been made for an alteration in the law and might never be made. From this last point the Editor ventures to differ. In all probability women will demand that the children, or some of them, shall follow the nationality of their mothers. To the objections of double nationality and statelessness the members pointed out that under the existing laws of the United Kingdom and the United States an American woman marrying an English man retains her American nationality and acquires a British nationality, whilst an English woman marrying an American citizen becomes stateless. They recommended therefore :

1. That a British woman shall not lose her nationality by the mere act of marriage with an alien. But that it shall be open to her to make a declaration of alienage and therefrom shall cease to be a British subject.

2. That an alien woman shall not acquire or be deemed to have acquired British nationality by the mere act of marriage with a British subject. But that if she or her husband are residing on British soil she shall be entitled to apply for British nationality without the necessity of complying with the ordinary conditions as to length of residence (*p*).

Provided that.—By this proviso, if the husband during the marriage ceases to be a British subject, the wife by a declaration retains her British nationality, and the British-born wife of an alien, if her husband's State is at war with Great Britain, and she desires to resume her nationality of origin, may be granted a certificate of naturalization.

For the form of the certificate of naturalization, see Reg. 4A., at p. 71, *infra*, and for that of restoration of British nationality, see Reg. 7, at p. 73, *infra*.

Status of
widows.

Section 11. A woman who, having been a British subject, has by, or in consequence of, her marriage become an alien, shall not, by reason only of the death of her husband, or the dissolution of her marriage, cease to be an alien, and a woman who, having been an alien, has by, or in consequence of, her marriage become a British

(*p*) See "Report by the Select Committee on the Nationality of Married Women," 1923, and for a method by which double nationality and statelessness may be avoided the model statute recommended by the Nationality and Naturalization Committee of the International Law Association adopted by the Stockholm Conference, 33rd Report, Stockholm, 1925.

subject, shall not, by reason only of the death of her husband or the dissolution of her marriage, cease to be a British subject.

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Status of widows and married women.—The rule having been established that the wife takes her husband's nationality, it was thought desirable to state with precision that the death of the husband or the dissolution of the marriage did not *ipso facto* cause any change in her status, whether a British subject before marriage to an alien or an alien before marriage to a British subject.

Upon the death of the husband the woman's nationality acquired by the marriage will remain unaltered. In the case of a British woman married to an alien and divorced, she has not the status of a "statutory alien" with the privilege of resuming British nationality, but can only regain it by marrying a British subject, or by becoming naturalized otherwise. There is no authority for suggesting that her original nationality would revert, and the section definitely settles this point, following s. 50 of the Report of the Naturalization Laws Committee. A judicial separation—a *mensa et thoro*—will not affect the nationality of the marriage. A decree of nullity will revive the former nationality, if it had been at all lost (*q*), since if there were no marriage the woman would not have acquired the nationality of the man.

Section 12.—(1) Where a person being a British subject ceases to be a British subject, whether by declaration of alienage or otherwise, every child of that person, being a minor, shall thereupon cease to be a British subject, unless such child, on that person ceasing to be a British subject, does not become by the law of any other country naturalized in that country. Status of children.

Provided that, where a widow who is a British subject marries an alien, any child of hers by her former husband shall not, by reason only of her marriage, cease to be a British subject, whether he is residing outside His Majesty's dominions or not.

(2) Any child who has so ceased to be a British subject may, within one year after attaining his majority, make a declaration that he wishes to resume British

(*q*) Cf. Piggott, *Nationality*, pt. 1, pp. 62-3.

nationality, and shall thereupon again become a British subject.

Status of children.—By sub.-s. (1) the minor children of a British subject who loses his or her nationality by declaration of alienage or otherwise (*e.g.*, by naturalization or on cession of territory) cease to be British subjects, unless by the effect of such declaration or act they do not become by the law of any other country naturalized in that country.

This, however, is subject to an exception in the case of the minor children of a widow who is a British subject and marries an alien. Such children remain British subjects unless the widow before remarriage becomes naturalized in the country of adoption and causes the children also to be naturalized. Under the law prior to the principal Act, it would appear that such children lost their British nationality by residing with their mother in her adopted country.

It is also subject to the provision contained in sub.-s. (2), whereby such minors may on attaining majority resume British nationality.

That the section has failed to solve the anomalies of double nationality is illustrated by the case of *Atkinson v. Recruiting Officer for District of Bury St. Edmunds* (r). In this case the appellant was born at Chicago in 1889, his father being then a natural-born British subject. In 1896 his father became a naturalized American citizen, and within a few months the appellant came to England, where he continued to reside.

By the American law of nationality the naturalization of the parents confers American citizenship upon the minor children, “and such citizenship shall begin at the time such minor children begin to reside permanently in the United States.”

Upon the facts it was held that the appellant did not begin to reside permanently in the United States, and that consequently he was not an American citizen, and since, at the time of his birth abroad, his father was a natural-born British subject, the appellant was a British subject. The point, however, was not taken at the hearing that by s. 1992 of the Revised Statutes the appellant was born within the allegiance and jurisdiction of the United States, and was consequently an American citizen. A letter from the American Embassy was admitted in evidence in which the opinion was expressed that the appellant was an American citizen and also a British subject.

As the appellant at the time he left the United States could have no mind of his own, and it is not stated what was the

(r) 116 L. T. 305 (1917).

intention of the father, it would seem impossible to say that he did not begin to reside permanently in the United States. If, quite apart from the fact of birth, the appellant became automatically naturalized in the United States upon the naturalization of his father, he would appear by this section to have lost his British nationality. If not, he possessed double nationality.

For the form of the declaration of resumption of British nationality, see Reg. 8, at p. 73, *infra*.

Section 13. A British subject who, when in any foreign state and not under disability, by obtaining a certificate of naturalization or by any other voluntary and formal act, becomes naturalized therein, shall thenceforth be deemed to have ceased to be a British subject.

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Loss of
British
nationality
by foreign
naturaliza-
tion.

The above statement of the law defining and limiting the acquisition of British nationality by birth leads naturally to the inquiry how such nationality can be lost. The maxim *Nemo potest exuere patriam* has long been thought to express the principle of the common law of the indissolubility of nationality. Allegiance was said to be a debt and duty to the Sovereign co-extensive with the life of the subject. "It is a principle of universal law," wrote Blackstone, "that the natural-born subject of one Power cannot by any act of his own—no, not by swearing allegiance to another—put off or discharge his natural allegiance to the former; for this natural allegiance was intrinsic and primitive and antecedent to the other, and cannot be diverted without the concurrent act of that Prince to whom it was first due" (s). This passage is lifted almost *verbatim* from Hale's Pleas of the Crown, 1, 68. The maxim in its full form appears to have been first used by Coke in his edition of Littleton's Tenures published in 1629, viz., *Nemo patriam, in qua natus est, exuere, nec legiantiae debitum ejurare, possit*. It was probably founded upon the following passage in the Code: "*Origine propria neminem posse voluntate sua eximi manifestum est*" (t), and was introduced by the Civilians about the same time in the sixteenth century as the maxim *Quod principi placuit legis habet vigorem* was retrieved from the Corpus Juris to support the absolutist claims of the Tudor monarchy. Both maxims were the product of the doctrine of absolute sovereignty as taught by Bodin and adopted by Hobbes.

Nationality
—how far
indissoluble.

(s) Comm. 1, 370, 1st ed., 1765. See also Coke in *Calvin's Case* (1608), 7 Co. 5a, and *R. v. Æneas Macdonald* (1747), Fost. 59.

(t) Code, 10, 38, 4. This paragraph refers to domicile of origin and domicile of choice, and has nothing to do with the modern theory of nationality.

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The tenacity with which the principle of indissoluble allegiance has since been maintained by Great Britain is well known as one of the causes of her differences with the United States at the commencement of the last century, and was conspicuous in bringing about the war of 1812. In the year 1842 it was asserted by Lord Ashburton, in 1848 by Lord Palmerston, and in 1866 by Lord Clarendon, in the course of negotiations with the United States. How diametrically opposed to this principle was the American theory will be best seen by contrasting with it the preamble of the Act of 27th July, 1868, on this subject: "Whereas the right of expatriation is a natural and inherent right of all people indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas, in the recognition of this principle, this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign States, owing allegiance to the Governments thereof; and whereas it is necessary to public peace that this claim of perpetual allegiance should be promptly and finally disavowed; therefore, Be it enacted that any declaration, instruction, opinion, order, or decision of any officers of this Government which denies, restricts, impairs, or questions the right of expatriation is hereby declared inconsistent with the fundamental principles of this Government" (*u*).

Nationality
—how
divested by
naturaliza-
tion abroad.

The "right of expatriation" is not, perhaps, the happiest of phrases, but it is manifest that the feudal theory of indissoluble allegiance had become an anachronism, and a Royal Commission was appointed in May, 1868, to inquire into the English laws of naturalization and allegiance generally. The result of that inquiry was the passing of the Naturalization Act, 1870 (*v*), by which the capacity of any British subject to renounce his allegiance was definitely established. It is enacted by s. 6 of that statute that any British subject who should thereafter or had already voluntarily become naturalized in a foreign State should from that time be deemed to have ceased to be a British subject, and be regarded as an alien. The same section contained a proviso enabling persons already naturalized abroad to retain their British nationality by making a declaration to that effect within two years from the passing of the Act. This "right of expatriation" is substantially re-enacted by s. 13.

(*u*) Wharton, *Conf. of Law* (1872), chap. i. ss. 3, 4. For other American authorities on the "right of expatriation," see Dana's *Wheaton* (1866), p. 143, note; and see generally the Report of the Royal Commission of 1870 on *Naturalization and Allegiance*.

(*v*) 33 Vict. c. 14.

“*When in any foreign State.*”—Under the corresponding section s. 6 of the Act of 1870 it was held that an Englishman who acquired a *landrecht* or *indigenat* in a Swiss canton in the year 1842 became a Swiss subject and ceased to be a British subject. It was contended that a Swiss canton was not a “foreign State” for this purpose, not having the power of declaring war or peace. Stirling, J., however, held that there was no substantial difference between the status acquired and nationality, and that such difference as existed arose solely from the fact that down to 1848 the Swiss cantons constituted a group of independent States, united for certain purposes by federation (x).

“*Ceased to be a British subject.*”—It was decided under s. 6 of the Act of 1870 that the section did not enable a British subject to become naturalized in an enemy’s country during time of war, such naturalization being an act which would have been illegal before the passing of the statute, and which remained so (y). Indeed, the very act of such naturalization with a view to escaping liability for treasonable acts might amount to treason (z).

Naturalization under this section was expressly declared to have no retrospective effect by s. 15, which enacted that “where any British subject has in pursuance of this Act become an alien, he shall not thereby be discharged from any liability in respect of any acts done before the date of his so becoming an alien.” In the case just cited, two of the overt acts of treason alleged were the making a declaration of willingness to take up arms for the foreign State, and the taking of an oath of allegiance to such State. These were acts essential to becoming naturalized in such State, and were followed by actual naturalization on the same day. It was held (Lord Alverstone, C.J., and Wills, J., Channell, J., doubting) that these acts must be treated as “acts done before the date of his so becoming an alien,” and not as contemporaneous with it or as part of the same transaction.

The decision in *Lynch’s Case* was followed during the war of 1914. In *Ex parte Freyberger (a)*, Freyberger was born in London of Austrian parents in 1896. By the law of Austria he was also an Austrian subject. In 1897 his father became a naturalized British subject. On 20th February, 1916, Freyberger was called up for military service on 6th March. He appealed, and his appeal was dismissed, and he received notice to join

(x) *In re Truport, Trafford v. Blanc* (1887), 36 Ch. D. 600, 612.

(y) *R. v. Lynch*, [1903] 1 K. B. 444. Cf. Halleck, *Int. Law* (1908), i. ch. xii. § 29; Duer, *Marine Insurance*, i. 5, § 35; and per Story, J., in *The Santissima Trinidad* (1812), 7 Wheaton, 283, 347; which indicate that the same view would be taken in the United States.

(z) *R. v. Lynch* (1903), per Wills, J., at p. 459.

(a) [1917] 2 K. B. 129.

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on 19th July; he surrendered to the police, was taken before the magistrate, and was handed over to the military authorities. He was then placed in the 30th Battalion Middlesex Regiment. Having attained the age of twenty-one on 23rd January, 1917, he made a declaration of alienage under s. 14 of the Act. He then claimed to be released from military service, but the military authorities refused to release him and referred him to the Home Secretary, who refused to register the declaration. He thereupon obtained a rule *nisi* for a writ of *habeas corpus* directed to the commanding officer of his regiment. The rule having been discharged by the Divisional Court, Freyberger appealed. Affirming the judgment of the Divisional Court, the Court of Appeal held that a British subject, although having a double nationality, cannot during a state of war divest himself of his allegiance to the British Crown in order to become solely the subject of an enemy State. And the Court further held that, even assuming the applicant was entitled to make a declaration, he was, under s. 1 (1) of the Military Service Act, 1916, "deemed as from the appointed date to have been duly enlisted in His Majesty's forces for general service with the colours or in the navy for the period of the war." Consequently, being properly within the control of the military authorities, he is not entitled to discharge even if he has become an alien. "Having acquired that statutory status," said Bankes, L.J., "he cannot in my opinion by any voluntary act on his part, whether it be a formal declaration of alienage under the Act of 1914, assuming for the moment he could make it, or any less formal act, divest himself of that status."

Veicht v. Taylor (b) was heard before the Divisional Court after *Ex parte Freyberger*. The appellant was born in England of Dutch parents in 1882, and, under the National Registration Act, 1915, was registered as of British nationality. On 8th November, 1916, he was arrested on a charge of failing, when called up for military service, to appear at the time and place appointed, and was brought before a magistrate, who adjourned the case to 15th November. On 9th November he made a declaration of alienage under s. 14, which was registered at the Home Office. On 15th November the magistrate held that the appellant was not discharged from the obligation to perform military service, and that the charge was proved. "Nothing," said Lord Reading, C.J., "which happened after 8th November could be an answer to the charge of failing to submit himself to the military authorities before that date. By 8th November the offence had been committed, and nothing done after that date could get rid of it. The appellant could only be discharged from

(b) 116 L. T. 446 (1917).

military service either under the Army Act, 1881, or in some other way provided for in the Military Service Acts.”

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In *Dawson v. Meuli* (c) the respondent was born in England of Swiss parents in 1892, and was called up for military service under the Military Service Act, 1916, and, after medical examination, was deemed to have been enlisted and transferred to the Reserve on 1st October, 1916. On 13th October he made a declaration of alienage under s. 14, which was registered at the Home Office on January 16, 1917. Upon being called up for service on 27th October, 1917, he failed to appear, and was brought before a justice, by whom he was discharged on the ground that as he had made a declaration of alienage he was not liable. In allowing the appeal, Darling, J., said that the respondent was undoubtedly on 1st October, 1916, a British subject, though also a Swiss subject, with the right of making a declaration of alienage, but he did not attempt to exercise that right until 13th October. Even if he ceased on that date to be a British subject, he did not cease to be a British soldier. Consequently the appeal must be allowed.

In *Gschwind v. Huntingdon* (d) the appellant Gschwind was born in Manchester of Swiss parents in 1892, and by the Swiss Civil Code acquired a right to the Swiss citizenship of his father. The appellant served in the Swiss Army from 1912 to December, 1914, and returned to England on leave in January, 1915. In August of that year under the National Registration Act, 1915, he described himself as a Swiss, and in February under the Aliens Restriction (Amendment) Order, 1916, registered himself as an alien. On 4th April, 1917, he made a declaration of alienage under s. 14, and was duly registered. He was called up as from 29th November, 1917, but failed to report for service. The magistrate held that when the Military Service Act came into operation the appellant was a British subject and liable to military service. In dismissing the appeal, Avory, J., said that the Legislature, in passing the Military Service Acts, must have been aware of the presence in this country of persons with double nationality—i.e., persons with a British nationality and also with the nationality of either an enemy or an allied or a neutral State, but the Acts contain no exception in favour of such persons. Unless, therefore, a person who was a British subject could be held to have ceased to be a British subject, the mere fact that he had another nationality did not take him out of the operation of those Acts. It was contended that the appellant had ceased to be a British subject before any proceedings were taken against him. The relevant date, however, was not the date of the pro-

(c) 118 L. T. 357 (1918).

(d) [1918] 2 K. B. 420.

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ceedings but the date when the Act in question applied to him. The appellant was within the operation of the Acts when they were passed, and on the appointed day he became a British soldier. Nothing that he could do after that date, whether by a "voluntary and formal act" under s. 13 or by a declaration of alienage under s. 14 or under s. 4 of the Act of 1890, could take him out of the operation of the Military Service Acts. It made no difference whether the declaration of alienage had been accepted by the Home Office, as in the present case, or whether, as in *Freyberger's Case*, it had not. Neither did it make any difference whether the nationality in favour of which the person is endeavouring to elect is enemy or neutral (e). On the other hand, where a British natural-born subject during the war was naturalized in Germany, it was held in *Re Chamberlain's Settlement*, [1921] 2 Ch. 533, that he was a German subject for the purposes of the execution of the provisions of the Treaty of Versailles, 1919, since the question whether a person was "a German national" within the meaning of Art. 207 of the Treaty and of the Order in Council of 18th August, 1919, was to be determined exclusively by German municipal law.

In *Fasbender v. Att.-Gen.*, [1922] 1 Ch. 232, where a British-born woman between the date of the signing of the Treaty of Versailles of 28th January, 1919, and the 10th of January, 1920, when it came into force, went to Germany and there married a German national, it was held by Russell, J., that she had lost her British and acquired a German nationality and that consequently her shares in an English limited company were subject to the charge imposed by the Treaty of Peace Order, 1919.

In *Kramer v. Att.-Gen.*, [1922] 2 Ch. 850, Kramer, of German parentage, was born in England and became naturalized in Germany. Having performed his military service in Germany he left for Siam, where he was required to register at the German consulate. Upon the declaration of war by Siam in 1917, he was arrested and deported to India, where he was interned. After the Treaty of Versailles he was sent back to Germany by the British authorities. At the date when the Treaty of Peace Order, 1919, came into effect, certain property belonging to him was in England. Astbury, J., following the decision in *In re Chamberlain's Settlement*, held that the expression "German nationals" included and was intended to include all persons who according to German law answered to that description, whether they had also any other nationality or not, and that Kramer being a German national, his property, notwithstanding that he

(e) See also *De Jager v. Att.-Gen. of Natal*, [1907] A. C. 326.

was also of British nationality, was subject to the charge imposed by the Order.

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Both these decisions were affirmed by the Court of Appeal. Lord Sterndale asked: Does German nationality mean of German nationality only or does it mean of German nationality although at the same time of another? "Looking at the Order in Council and the Treaty as a whole, I am of opinion that the latter is the true meaning. I think the governing idea is that property of German nationals should be charged. German nationality was the thing sought, and it is no answer for the plaintiff or anyone else to say: "Though it is true I am a German national, I am also of another nationality," or that the Crown is seeking to affect the property of British, allied or neutral nationals without plain words. The answer seems to me to be clear—namely, that the Crown is not seeking to do anything of the sort; it is seeking to affect the property of German nationals, and should not be precluded from doing so by the accident that the undoubted German has also another nationality. When a person like the plaintiff is to all intents and purposes a German, I see no hardship on him and nothing unconstitutional in holding that he is a German, although he happen to have also a British nationality from the accident of his having been born in this country at a time when his father was resident though not naturalized here" (f).

In really hard cases, as the learned Judge pointed out, relief may be given under the dispensing power conferred by the Order in Council.

From the judgment of the Court in the latter case *Younger, L.J.*, dissented mainly on the ground that British subjects cannot by an Order in Council be dispossessed of their property without compensation.

British nationality acquired by naturalization is lost by a declaration of alienage where a Convention exists with the country of origin permitting the subjects of that country to divest themselves of the status of British nationality.

When in any foreign State.—These words render it clear that a British subject can only become naturalized in a foreign State if he is actually present within such State. Thus, according to *Dicey*, naturalization, for instance, in France of British subjects still within the British Dominions by the French Legislature would be ineffective in the United Kingdom, although valid in France. It would also appear that there must be some act on the part of the naturalized person proving his voluntary assent (f).

(f) Affirmed by H. L., [1923] A. C. 528.

(ff) Conflict of Laws, p. 198.

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Declaration
of alienage.

Section 14.—(1) Any person who by reason of his having been born within His Majesty's dominions and allegiance or on board a British ship is a natural-born British subject, but who at his birth or during his minority became under the law of any foreign state a subject also of that state, and is still such a subject, may, if of full age and not under disability, make a declaration of alienage, and on making the declaration shall cease to be a British subject.

(2) Any person who though born out of His Majesty's dominions is a natural-born British subject may, if of full age and not under disability, make a declaration of alienage, and on making the declaration shall cease to be a British subject.

It has been suggested that there appears to be no reason why a declaration of alienage may not be made in time of war if unaccompanied by the intention or followed by the fact of adhering to the King's enemies. But it is clear from s. 16, *infra*, that such a declaration has no retrospective effect, and that a British subject who ceases to be a British subject remains subject to any obligation, duty or liability in respect of any act committed by him before he ceased to be a British subject.

It would appear, however, from the decision in *Pedlar v. Johnson* (g) that a British subject may become naturalized in a neutral State and engage in acts of hostility against his State of origin without sacrificing his rights as a friendly alien. In this case the Irish Courts recognised the right of a British subject to become naturalized in a neutral State during time of war. The plaintiff was born in Ireland and became naturalized in the United States in 1916, when he returned to Ireland and took part in the Easter Rebellion against the British Crown. It was held by the majority of the Court of Appeal that, although personally hostile to the Crown, the plaintiff had all the rights of a friendly alien, and could own personal property and sue for its recovery.

Not under disability.—By s. 27 (1) the expression "disability" is defined as "the status of being a married woman or a minor, lunatic or idiot." The disability, however, of a British subject to change his nationality during war does not apply to a natural-born British woman upon marriage with an alien, even though the alien be an enemy. In *Fasbender v. Att.-Gen.* (h),

(g) [1920] 2 I. R. 450.

(h) [1922] 1 Ch. 232.

where a British-born woman married a German after the Armistice, but before the ratification of the Treaty of Versailles, 1919, it was held that she became a German upon her marriage, and consequently her property became subject to attachment as that of a German.

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Section 15. Where His Majesty has entered into a convention with any foreign state to the effect that the subjects or citizens of that state to whom certificates of naturalization have been granted may divest themselves of their status as such subjects, it shall be lawful for His Majesty, by Order in Council, to declare that the convention has been entered into by His Majesty; and from and after the date of the Order any person having been originally a subject or citizen of the state therein referred to, who has been naturalized as a British subject may, within the limit of time provided in the convention, make a declaration of alienage, and on his making the declaration he shall be regarded as an alien and as a subject of the state to which he originally belonged as aforesaid.

Power of
naturalized
subjects to
divest them-
selves of
their status
in certain
cases.

This section substantially re-enacts s. 3 of the Act of 1870, omitting, however, the mode in which a declaration of alienage may be made, viz. :—

“A declaration of alienage may be made as follows; that is to say: If the declarant be in the United Kingdom, in the presence of any justice of the peace; if elsewhere in her Majesty’s dominions, in the presence of any judge of any court of civil or criminal jurisdiction, of any justice of the peace, or of any other officer for the time being authorised by law in the place in which the declarant is to administer an oath for any judicial or other legal purpose. If out of her Majesty’s dominions, in the presence of any officer in the diplomatic or consular service of her Majesty.”

The convention with the United States made in pursuance of this section will be found in a schedule to the amending statute, 35 & 36 Vict c. 39 (Naturalization Amendment Act, 1872). S. 3 of the same amending Act was passed to remove doubts as to the effect of the 1870 Act on the rights in property of women married before the passing of that Act (*i*).

This Convention, ratified on 4th May, 1871, was supplementary to that of 13th May, 1870; they are to be read together.

(*i*) *Infra*, pp. 93, 94.

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As there was some doubt whether its provisions were in accordance with the Naturalization Act, 1870, the Naturalization Act, 1872, was passed to confirm the renunciations of nationality and naturalization made by British subjects and American citizens before the dates stated in Art. 1 of the Convention—viz., 12th May, 1872, and 10th August, 1872, respectively. The mode in which renunciation was to be made followed the provisions contained in s. 3 of the Act of 1870.

Saving of obligations incurred before loss of nationality.

Section 16. Where any British subject ceases to be a British subject, he shall not thereby be discharged from any obligation, duty or liability in respect of any act done before he ceased to be a British subject.

Obligation, duty, or liability.—As stated, naturalization in a State with which the State of the naturalized person is at war is not recognised, and consequently such naturalization does not free the said person from military service due to his State of origin—see *R. v. Lynch (k)*, p. 43, *supra*. In *Dawson v. Meuli (l)* Meuli was born in England of Swiss parents in 1892. With the exception of two or three years during infancy he had resided continuously in England. In 1915 he twice offered himself for military service, and was rejected on medical grounds. On 1st October, 1916, he was deemed to have been enlisted, but on the 16th made a declaration of alienage. It was held by the Divisional Court that although he possessed a double nationality and the right to make a declaration of alienage, he did not exercise this right before he had come under the terms of the Military Service Act, 1916. Even if he had ceased to be a British subject, he did not necessarily cease to be a British soldier. The Court was in any case bound by the decision of the Court of Appeal in *Ex parte Freyberger (m)*, where it was held that a natural-born British subject of double nationality cannot by a declaration of alienage claim discharge from the Army.

* * * * *

Aliens, disabilities of.

The case of *Isaacson v. Durant*, in which the right to exercise the parliamentary franchise (*n*) was concerned, leads naturally to the subject of the disabilities of aliens in England. By the

(k) [1903] 1 K. B. 444.

(l) 118 L. T. 357 (1918).

(m) [1917] 2 K. B. 129.

(n) Aliens are debarred at common law from exercising the parliamentary franchise (cf. also the unanimous resolution of the House of Commons in 1698, 12 Comm. Jour. 367; and by statute from voting at a borough, county council or parish council election, or parish meeting. (Municipal Corporations Act, 1882, s. 9; County Electors Act, 1888, s. 2 (2); Local Government Act, 1894, s. 2 (1); cf. Naturalization Act, 1870, s. 2 (2)).

common law, an alien could not hold landed property, not even under lease. It is stated that until the reign of Edward I., when they were permitted by charter to hire houses of their own, foreign merchants in England always lived in lodgings, their landlords acting as their brokers and selling their merchandise for them (o). By positive enactment in the reign of Henry VIII. (32 Hen. 8, c. 16, s. 83) it was declared that all leases to alien artificers or handicraftsmen of any dwelling-house or shop should be void, and a penalty of £100 was imposed on both lessor and lessee. It was not until 7 & 8 Vict. c. 66 that the harshness of this law was in terms relaxed, though in practice it had, of course, become obsolete. By the statute just mentioned, aliens were made capable of holding lands or houses for residence or business for a term not exceeding twenty-one years, as if natural-born subjects, except that they were not to acquire the right of voting for members of Parliament. The right of an alien to take and hold personal property is also enacted by the same statute; though this seems only to have been declaratory of the common law (p).

Further, at common law an alien, whether a subject of a friendly State or of a hostile State, possesses no legal right even to enter British territory (q); but, during his residence within British dominions he owes a local allegiance to the Crown to the same extent as a British subject. Hence he is for the time being subject to a writ of *ne exeat regno* (r), and to all the laws of the State, including, of course, the law of treason. Accordingly it was held in a later case (s) that an alien resident in British territory notwithstanding a state of war between his country and this, and the military occupation by his country of that part of British territory in which he resides, none the less continues to owe allegiance to the Crown; so that if, when the British forces temporarily evacuate that territory, he takes up arms for the invaders, he is guilty of treason (t).

The position of an alien even after the passing of the Naturalization Act, 1844 (u), was nevertheless one of considerable hardship. He was incapable of being a member of the Privy Council or of either House of Parliament (x), or of holding any

(o) Co. 2 Inst. 57; Chitty, Comm. Law, i. 131; Cockburn on Nationality, p. 140.

(p) *Calvin's Case* (1608), 7 Co. 17 a. Cf. 1 Black. Comm. 360.

(q) Cf. *Musgrove v. Chun Teeong Toy*, [1891] A. C. 272.

(r) *De Carrière v. De Calonne* (1799), 4 Ves. 577.

(s) *De Jager v. Att.-Gen. of Natal*, [1907] A. C. 326.

(t) 1 East, P. C., p. 52; 1 Hale, Hist. of the Pleas of the Crown, p. 59.

(u) 7 & 8 Vict. c. 66.

(x) The Act of Settlement, 1700 (12 & 13 Will. 3, c. 2), s. 3, prohibits even a naturalized alien from being a member of the Privy Council or of either House of Parliament; and this is still the law as to persons naturalized otherwise than under the Acts of 1870 and 1914.

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municipal office, or of voting at parliamentary or municipal elections, or of filling any office or place of trust, civil or military. He was incapable of holding real estate in fee, or for life, or for years, except that for residence or business purposes he might take a lease not exceeding twenty-one years. If an alien purchased a freehold estate, the Sovereign became entitled to it. If copyhold, it escheated to the lord (*y*). Not only was he incapable of holding, but of inheriting; and at common law he was incapable of transmitting an estate by descent, so that wherever it was necessary to trace descent through an alien, it was impossible to inherit (*z*). But so far as the power of transmitting an estate was concerned, this hardship was cured by 11 & 12 Will. 3, c. 6 (*a*), which provided that natural-born subjects might derive title by descent through an alien ancestor.

All these disabilities, however, were removed by the Naturalization Act, 1870, and by that statute an alien might hold both real and personal property in the United Kingdom without any restriction, except that no qualification for any franchise or office was to be gained thereby.

The following section of the principal Act substantially re-enacts ss. 2 and 14 of the 1870 Act :—

Status of Aliens.

Capacity of
alien as to
property.

Section 17. Real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from or in succession to an alien in the same manner in all respects as through, from or in succession to a natural-born British subject :

Provided that this section shall not operate so as to—

- (1) Confer any right on an alien to hold real property situate out of the United Kingdom;
or
- (2) Qualify an alien for any office or for any municipal, parliamentary, or other franchise;
or

(*y*) Ventris, 413, 416, 418; Com. Dig. Alien, C (1), (2).

(*z*) Co. Litt. 8 a; Ventris, *ibid.*; Com. Dig. *ibid.*; cf. *Rittson v. Stordy* (1856), 2 Jur. (N.S.) 410.

(*a*) As explained by 25 Geo. 2, c. 39.

- (3) Qualify an alien to be the owner of a British ship; or
- (4) Entitle an alien to any right or privilege as a British subject, except such rights and privileges in respect of property as are hereby expressly given to him; or
- (5) Affect any estate or interest in real or personal property to which any person has or may become entitled, either mediately or immediately, in possession or expectancy, in pursuance of any disposition made before the twelfth day of May eighteen hundred and seventy, or in pursuance of any devolution by law on the death of any person dying before that day.

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“*Held and disposed of.*”—It was held on the corresponding s. 2 of the 1870 Act that the privileges conferred on British subjects by Lord Kingsdown’s Act (24 & 25 Vict. c. 114) of making a valid will either according to the *lex loci*, the *lex domicilii*, or the *lex domicilii originis*, are not by virtue of it extended to aliens, although “dispose of” includes disposition by will (b). It was also held that the determination of the validity of an alien’s will still depends on the general principles of law in existence before the year 1861.

Disposition
by will.

It may be contended, however, that sub-s. 4 of the proviso should be interpreted so as to enable an alien to dispose by will of personal property in the same manner in all respects as a natural-born British subject. But Dicey and Keith think the Courts will probably decide otherwise (c).

Transfer of British ships.—Sub-s. 3 provides that the Act shall not qualify an alien to be the owner of a British ship (d). But an alien may, of course, purchase a British ship, which thereby ceases to be British; and if a vessel is built in England to be sold to a foreigner, and to be delivered to him abroad, she is not, it seems, a “British ship” within the Merchant Shipping Act, 1894; so that an assignment of her need not be by bill of sale, and does not require registration as such (d).

Aliens and
British
ships.

During the war certain temporary measures were enacted to restrict the transfer of British ships to aliens. By the British

(b) *Bloxam v. Favre* (1883), 9 P. D. 130; *In the Goods of Buseck* (1881), 6 P. D. 211. See p. 302, *infra*.

(c) *Conflict of Laws*, p. 208.

(d) Cf. the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 1.

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Ships (Transfer Restrictions) Act, 1915 (e), the transfer after 12th February, 1915, of a British ship or of a share therein to a person not qualified to own a British ship has no effect unless approved by the Board of Trade. This Act was extended by the British Ships (Transfer Restrictions) Act, 1916 (f), so as to apply after 10th August, 1916, to mortgages (including transfers of mortgages) and to transfers of ships to foreign-controlled companies.

The latter expression is defined as—

“any corporation,—

- “(a) where the majority of the directors or persons occupying the position of directors, by whatever name called, are not British subjects; or
- “(b) where the majority of the voting power is in the hands of persons who are not British subjects or who exercise their voting powers directly or indirectly on behalf of persons who are not British subjects; or
- “(c) where the control is by any other means whatever in the hands of persons who are not British subjects; or
- “(d) where the executive is a foreign-controlled company, or where the majority of the executive are appointed by a foreign-controlled company.”

These statutes remained in force until the expiration of three years from the conclusion of peace.

A further difficulty arises upon the scope of the section. The headline to the corresponding provision in the Act of 1870 is as follows: “The Status of Aliens in the United Kingdom.” Part III. of the principal Act, in which s. 17 is enacted, is entitled “General,” and clause 1 of the proviso would appear to show that the section is intended to apply to the colonies and possessions (g). If this construction is correct, a Colonial Legislature is not entitled to restrict the rights given to aliens by the section. But, as Professor Keith has pointed out, it is not a universal rule in the Dominions that all personal property may be taken, acquired, held or disposed of by an alien in the same manner in all respects as by a natural-born British subject. In Queensland, for instance, the similar provisions in the Act of 1870 were not given as applicable in the Revised Statutes, and they were enacted in Tasmania as a new Act by No. 12 of 1913, and were also enacted elsewhere (h). Possibly the powers of colonial Legis-

(e) 5 Geo. 5, c. 21.

(f) 6 & 7 Geo. 5, c. 42.

(g) Dicey & Keith, *Conflict of Laws*, p. 208.

(h) *Imperial Unity and the Dominions*, p. 253.

latures and Governments of British Possessions to legislate in restriction of such rights are saved by s. 26 (1) of the Act.

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Franchise.—By s. 9 (3) of the Representation of the People Act, 1918 (7 & 8 Geo. 5, c. 64), a person is not entitled to be registered or to vote as a parliamentary or local government elector unless he is a British subject.

An alien who has been domiciled in England for ten years may, if not disqualified in other respects, serve on juries or inquests (*i*), but, by s. 8 of the Aliens Restriction Act, 1919, no alien may sit upon a jury in any judicial or other proceedings if challenged by any party to the proceedings.

In exceptional cases an alien may be naturalized by private Act of Parliament. The rights thus granted and the disabilities imposed depend on the terms of the particular enactment (*k*). A Naturalization Bill must be first introduced in the House of Lords, but must be preceded by a petition, with a copy of the proposed Bill attached, for leave to bring in the Bill (*l*). Before the Bill is read a second time, the consent of the Crown must be obtained, and the petitioner must produce a certificate of good conduct from the Secretary of State, and take the oath of allegiance at the bar of the House (*m*).

Nationality
acquired by
private Act
of Parlia-
ment.

With the consent of the Crown, given through a Secretary of State, an alien may enlist in His Majesty's regular forces; but the number of aliens serving together at any one time in any corps must not be greater than one-fiftieth of the number of British subjects. An enlisted alien, however, may not hold higher rank than that of a warrant officer or non-commissioned officer (*n*). Notwithstanding such provision, a person of colour, even though he be an alien, may enlist, and is entitled, during service, to all the privileges of a natural-born British subject (*o*).

Service
with H.M.
Forces.

The powers conferred by the Aliens Restriction Act of 1914 (4 & 5 Geo. 5, c. 12), for the extension, control and deportation of aliens during a state of war or national emergency are by the Aliens Restriction (Amendment) Act, 1919 (9 & 10 Geo. 5, c. 92), made permanent by the substitution of the words "at any time," and further restrictions are imposed upon the personal rights of aliens in which they were in the enjoyment prior to the war of 1914. Aliens inciting to sedition in industrial unrest are liable to penal servitude. No alien may hold a pilotage certificate, except

Aliens
Restriction
Acts.

(i) Juries Act, 1870, s. 8.

(k) For precedents, see *Encyclopædia of Forms*, vol. ix, pp. 31, 32.

(l) *Stand. Ord.*, H. of L., 149-151.

(m) *Ibid.* 179, 180.

(n) Army Act, 1881 (44 & 45 Vict. c. 58), s. 95 (1).

(o) *Ibid.*, s. 95 (2). As to the effect of war on commercial relations of aliens, see Pitt Cobbett, *Leading Cases on International Law* (4th ed.), by Bellot, ii., pp. 82-143.

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certain certificates issued to masters or mates of French nationality. No alien may act as master, chief officer or chief engineer of a British merchant ship registered in the United Kingdom, or as skipper or second hand of a British fishing boat registered in the United Kingdom, except in the case of a ship or boat employed habitually between ports outside the United Kingdom. Aliens certified by the Admiralty for good service during the war are exempt from these restrictions. No alien may be employed in any capacity on board a British ship at a lower rate of pay than that current on British ships for his rating. Aliens other than former enemy aliens habitually employed afloat in any capacity or in any climate for which they are specially fitted are exempt from the above restrictions except that relating to pay.

No alien may be employed on a British ship registered in the United Kingdom unless he has produced satisfactory proof of his nationality. No alien may be appointed to any office or place in the civil service, nor may he assume or use or continue after the commencement of the Act the assumption or use of any name other than that by which he was ordinarily known on 4th August, 1914, nor carry on business in any name other than that in which he carried on business at the said date without the consent of the Secretary of State.

Thus in *Ernest v. Commissioners of Metropolitan Police* (p), where the appellant became a naturalized British subject in 1912 and changed his name from Ernst to Ernest by deed-poll in 1915, he was held to have been properly convicted under Reg. 14H of the Defence of the Realm (Consolidation) Regulations, 1914, for that, not being a natural-born British subject, he used a name other than that by which he was ordinarily known at the beginning of the war. The appellant contended that Reg. 14H was *ultra vires*, inasmuch as it deprived him of rights, powers and privileges granted to him by the certificate of naturalization under the Act of 1870. It was held by the Court that the regulation was not *ultra vires*. "The Naturalization Act," said Salter, J., "gave to naturalized British subjects the same rights as those enjoyed by natural-born British subjects and this regulation discriminates between them by depriving the naturalized subject of the right to change his name. It does not matter whether those rights are great or small. Section 7 of the Naturalization Act, 1870, and s. 3 of the British Nationality and Status of Aliens Act, 1914, give to a person to whom a certificate of naturalization has been granted all the rights, powers and privileges of a natural-born British subject and Reg. 14H deprives the naturalized sub-

ject of some of those rights. Section 1 (1) of the Act of 1914 gives power to His Majesty in Council during the continuance of the war to make regulations for a definite purpose, to secure the public safety and the defence of the realm, and sub-s. 2 provides that a regulation may supersede an existing statute." Consequently the Court held that regulations made under the Act of 1914 have all the force of a statute and may take away a statutory privilege or impose a statutory duty.

On the other hand, where an alien named Karel Kollross purchased in 1921, and continued to carry on, a business, under the name of the Widmore Laundry, which business had been carried on by his predecessors for many years prior to 1914, it was held by the Divisional Court that Kollross had committed no offence against s. 7 (1) of the Act, and that he had complied with the provisions of sub-s. (2) by continuing to use the pre-war name of the business (*pp*).

The use of any name under a royal licence or an exemption under the Defence of the Realm Regulations or the Aliens Restriction Order in force on 1st January, 1919, is not affected by the above restrictions, nor the assumption or user by a married woman of her husband's name.

Further, no former enemy alien may be employed or act as master, officer, or member of the crew of a British ship registered in the United Kingdom.

It was decided in *Pedlar v. Johnstone*, [1920] 2 Ir. R. 450, by the Court of Appeal (O'Connor, M.R., dissenting) that a resident friendly alien is a subject so long as he remains in the kingdom and that he possesses the same rights over property as a natural-born subject, save that his lands are liable to forfeiture on office found.

In this case *Pedlar* was born in Ireland and naturalized in the United States. He returned to Ireland in 1916, and took part in the Easter Rebellion of that year, for which he was arrested and imprisoned. He subsequently took part in illegal drilling, was again arrested in 1918, imprisoned and a sum of money found on him, seized and detained by the police, and its confiscation ratified by the Chief Secretary for Ireland. In the action for the recovery of this money, the defendant pleaded that the confiscation of the money was an act of State.

The majority of the Court found that *Pedlar*, although personally hostile to the Crown, had all the rights of a friendly alien, including that of holding property within the realm and of suing for its recovery if wrongfully deprived of its use. The

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ratification by the Crown did not affect the issue, since an illegal act cannot be the subject-matter of a ratification.

By the Aliens Restriction Act, 1919, temporary restrictions were placed on the acquisition by former enemy aliens of certain kinds of property, "former enemy alien" being defined as "a subject or citizen of the German Empire or any component State thereof, or of Austria, Hungary, Bulgaria, or Turkey, or who, having at any time been such subject or citizen, has not changed his allegiance as a result of the recognition of new States or territorial rearrangements or been naturalized in any other foreign State or in any British possession in accordance with the laws thereof and when actually resident therein and does not retain according to the law of his State of origin the nationality of that State."

Accordingly by s. 11, former enemy aliens are prohibited during the period of *three years* from the passing of the Act, *i.e.*, 23rd December, 1919, from acquiring

"(a) any land or any interest in any land in the United Kingdom; or

"(b) any interest in a key industry or any share or interest in a share in a company registered in the United Kingdom which carries on any such industry; or

any share or interest in a company owning a British ship registered in the United Kingdom."

These restrictions do not apply to women former enemy aliens who at the time of their marriage were British subjects (s. 15).

But in *Rex v. Home Secretary; Bressler, Ex parte*, [1924] 88 J. P. 89, where the Home Secretary had made a deportation order against an alien convicted of failure to register as such, he subsequently made a similar order against his British-born wife. Upon the application of the latter for a writ of *habeas corpus* on the ground that the Home Secretary could not properly exile her merely because she was the wife of an alien no offence being alleged against her, it was held by the Court of Appeal that the discretion of the Home Secretary was absolute and that the writ must therefore be refused.

It had already been held by the Divisional Court in *Rex v. Leman Street Police Station Inspector; Vinicoff, Ex parte*, [1920] 3 K. B. 72, that the Home Secretary in making a deportation order under the Aliens Restriction Act, 1914, and Art. 12 of the Aliens Order, 1919, acts not as a judicial but as an executive officer. Consequently his discretion was absolute and he was not bound to hold an enquiry or to give to the person charged the opportunity of being heard.

In *Rex v. Graham Campbell; Ahmed Hamid Moussa, Ex*

parte, [1921] 2 K. B. 473, it was held by the Divisional Court that a recommendation by the magistrate for deportation was not part of "the penalty adjudged" and consequently the person convicted summarily had no right of appeal.

In *Rex v. Governor of Brixton Prison; Sugarman, Ex parte*, 127 L. T. 27 (1922), where the Home Secretary had made an order for deportation of Sugarman under the Aliens Restriction Acts and the Order in Council of the 25th March, 1920, made under the Aliens Restriction Amendment Act, 1919, by which the powers exercisable under s. 1 (1) of the Aliens Restriction Act, 1914, were renewed, it was held by the Divisional Court that by the Expiring Laws Continuance Acts, 1920 and 1921, the powers conferred by the Act of 1919 had been continued and were still in force (*q*).

And in *Rex v. Kakelo*, [1923] 2 K. B. 793, it was declared by the Divisional Court that the Act of 1914 was not repealed by the Act of 1919 : on the contrary, both Acts are to be read as one. Sect. 1 (4) of the Act of 1914 enacted that the proof that the person charged was not an alien was upon the person alleging he was not an alien. The defendant who was convicted of obtaining credit by fraud and with making a false statement contrary to Art. 18 (4) (b) of the Aliens Order, 1920, was sentenced to imprisonment and recommended for deportation. In his appeal he contended that s. 1 (4) only applied during a state of war or during some national emergency and that therefore the onus rested upon the prosecution to prove that he was an alien. The Court rejected this contention and holding that sub-s. 4 (b) still remained in force, held that onus was upon the defendant to prove he was not an alien and not upon the prosecution to prove that he was.

Sect. 10 of the Act of 1919 relating to permission to land of, and s. 11 relating to acquisition of property by, former enemy aliens, expired on the 23rd December, 1923.

It was held by McCardie, J., in *In re The Estate of Woolf*, 34 T. L. R. 477 (1918), that where a British subject resident in an enemy country dies there intestate, and some of the next-of-kin are enemy subjects resident in that country and one of them is a British subject resident here, the Court will grant letters of administration to the next-of-kin resident here, provided no good cause is shown to the contrary, although all the next-of-kin are equally entitled to the estate.

It was held in *Schulze's Case*, [1917] S. C. 400, by the Court

(*q*) See also *Rex v. Governor of Brixton Prison, Ex parte Bloom*, 90 L. J. K. B. D. 574 (1921); *Rex v. Governor of Brixton Prison, Ex parte Sarno*, [1916] 2 K. B. 742.

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of Session following the English decisions (*r*) that an alien enemy, resident in Scotland and duly registered under the Aliens Restriction Act, 1914, and relative Order in Council might be appointed an executor-dative to his deceased son. "Although," said Lord Salvesen, "an enemy alien, the applicant is residing here under the protection of the King. Nationality it has now been clearly settled, is not the test, for a person of British nationality presently residing in Germany would not be entitled to institute legal proceedings in our Courts. I do not think the fact that this is an administrative suit makes any difference. On the contrary, the very fact that the applicant is not allowed to leave the country without a licence, ensures that the Courts of this country will continue to exercise jurisdiction over him; and as he must find caution for his intromissions, the estate is as safe in his hands as it would be in the hands of a British subject."

It is impossible here to do more than direct attention to the restrictions imposed upon enemy aliens by the numerous statutes dealing with the control and liquidation of their businesses. In particular it should be noted that the Trading with the Enemy (Amendment) Act, 1918 (*rr*), applies for a period of five years from the termination of the war and thereafter until Parliament otherwise determines. By s. 2 no banking business may be carried on in the United Kingdom (a) by a company which is an enemy-controlled corporation within the meaning of the Act; or (b) by a firm or individual if the business carried on is one with respect to which an order for the winding-up thereof could have been made under s. 1 of the Trading with the Enemy Act, 1916 (*s*).

Trial of
alien.

Section 18. An alien shall be triable in the same manner as if he were a natural-born British subject.

By s. 5 of the 1870 Act the right of an alien to a jury *de medietate linguæ* was abolished, so that he might be tried for a criminal offence, just as though he were a British subject. Before 1870 he had the statutory right, if indicted for felony or misdemeanour (but since 1554 not for treason), to be tried by a jury consisting of equal numbers of British and alien jurors.

In view of this section being enacted in Part III. of the Act it may be contended that it is applicable to the dominions and British possessions outside the United Kingdom. But the powers

(*r*) See *Schaffenius v. Goldberg*, [1916] 1 K. B. 284; *Porter v. Freudenberg*, [1915] 1 K. B. 857; *Princess Thurn and Taxis v. Moffit*, 31 T. L. R. 24 (1914), and, generally, Pitt Cobbett, ii. pp. 19-22, 62-125, 4th ed., by Bellot.

(*rr*) 8 & 9 Geo. 5, c. 67.

(*s*) 5 & 6 Geo. 5, c. 105.

of colonial Legislatures and Governments of British possessions to legislate in restriction of the rights conferred by this section would appear to be saved by s. 26 (1).

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It was held in *The King v. Kakelo*, [1923] 2 K. B. 793, that offences against the Aliens Restriction Act, 1914, and the Aliens Restriction (Amendment) Act, 1919, are punishable only in the manner prescribed by the statutes, viz. : on summary conviction—unless the person charged with the offence claims the right under s. 17 of the Summary Jurisdiction Act, 1879, to be tried by a jury. If he does so the person charged by his own election turns the offence into an indictable one. It was also held that when any question arises whether the person charged is an alien or not, the onus lies upon him under the statute to prove that he is not an alien, and not upon the prosecution to prove that he is.

Procedure and Evidence.

Section 19.—(1) The Secretary of State may make regulations generally for carrying into effect the objects of this Act, and in particular with respect to the following matters :—

Regulations
by Secretary
of State.

- (a) The form and registration of certificates of naturalization granted by the Secretary of State :
- (b) The form and registration of declarations of alienage and declarations of resumption or retention of British nationality :
- (c) The registration by officers in the diplomatic or consular service of His Majesty of the births and deaths of British subjects born or dying out of His Majesty's dominions :
- (d) The time within which the oath of allegiance is to be taken after the grant of a certificate of naturalization :
- (e) The persons by whom the oath of allegiance may be administered, and the persons before whom declarations of alienage and declarations of resumption of British nationality may be made :
- (f) Whether or not oaths of allegiance are to be subscribed as well as taken, and the form in which the taking and subscription are to be attested :
- (g) The registration of oaths of allegiance :

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- (h) The persons by whom certified copies of oaths of allegiance may be given; and the proof in any legal proceeding of any such oaths :
- (i) The transmission to the United Kingdom, for the purpose of registration or safe keeping or of being produced as evidence, of any declarations, certificates or oaths, made, granted or taken out of the United Kingdom in pursuance of this Act or of any Act hereby repealed, or of any copies thereof, also of copies of entries contained in any register kept out of the United Kingdom in pursuance of this Act or any Act hereby repealed :
- (j) With the consent of the Treasury, the imposition and application of fees in respect of any registration authorised to be made by this Act or any Act hereby repealed and in respect of the making of any declaration or the grant of any certificate authorised to be made or granted by this Act or any Act hereby repealed, and in respect of the administration or registration of any oath : Provided that in the case of a woman who was a British subject previously to her marriage to an alien, and whose husband has died or whose marriage has been dissolved, the fee for the grant of a certificate shall not exceed five shillings.

(2) Any regulation made by the Secretary of State in pursuance of this Act shall be of the same force as if it had been enacted therein, but shall not, so far as respects the imposition of fees, be in force in any British Possession, and shall not, so far as respects any other matter, be in force in any British Possession in which any Act or ordinance, or, in the case of a Dominion specified in the First Schedule to this Act, any regulation made by the Government of the Dominion under Part II. of this Act, to the contrary of, or inconsistent with, any such regulation may for the time being be in force.

- (3) Any regulations made by the Secretary of State

under any Act hereby repealed shall continue in force and be deemed to have been made under this Act.

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For the regulations made in pursuance of this section, and for the forms of certificates and declarations thereunder, see pp. 67-75, *infra*.

Section 20. Any declaration made under this Act or under any Act hereby repealed may be proved in any legal proceeding by the production of the original declaration or of any copy thereof certified to be a true copy by the Secretary of State, or by any person authorised by him in that behalf, and the production of the declaration or copy shall be evidence of the person therein named as declarant having made the declaration at the date therein mentioned.

Evidence of
declarations.

Section 21. A certificate of naturalization may be proved in any legal proceeding by the production of the original certificate or of any copy thereof certified to be a true copy by the Secretary of State, or by any person authorised by him in that behalf.

Evidence of
certificates of
naturaliza-
tion.

Section 22. Entries in any register made in pursuance of this Act or under any Act hereby repealed may be proved by such copies and certified in such manner as may be directed by the Secretary of State, and the copies of any such entries shall be evidence of any matters, by this Act or by any Act hereby repealed or by any regulation of the Secretary of State, authorised to be inserted in the register.

Evidence of
entries in
registers.

Section 23. If any person for any of the purposes of this Act knowingly makes any false representation or any statement false in a material particular, he shall, in the United Kingdom, be liable on summary conviction in respect of each offence to imprisonment with or without hard labour for any term not exceeding three months.

Penalty for
false repre-
sentation or
statement.

Section 24. The oath of allegiance shall be in the form set out in the Second Schedule to this Act.

Form of
oath of
allegiance.

Supplemental.

Section 25. Nothing in this Act shall affect the grant of letters of denization by His Majesty.

Saving for
letters of
denization.

PART I.
PERSONS.

CAP. I.

Letters of
denization.

This section re-enacts s. 13 of the 1870 Act. The privileges of denization therefore can still be granted by royal letters patent and in this case no previous residence is required. It may be here stated, with regard to the acquisition of British nationality by letters of denization, that the granting of such privileges is within the absolute discretion of the Crown. Such letters patent are obtainable on petition, through the Home Secretary, setting out the circumstances which make it impossible or impracticable for the petitioner to become naturalized in accordance with the provisions of the principal Act. The grant may be temporary or conditional, and may specify what rights are conferred, or it may award all the rights of a natural-born subject, with the exception of such as are indicated in the following paragraph. In the absence of express terms to the contrary, the grant is not retrospective (*ss*); and, in any case, is made only after the oath of allegiance has been taken (*t*).

Saving for
powers of
Legislatures
and Govern-
ments of
British pos-
sessions.

Section 26.—(1) Nothing in this Act shall take away or abridge any power vested in, or exerciseable by, the Legislature or Government of any British Possession, or affect the operation of any law at present in force which has been passed in exercise of such a power, or prevent any such Legislature or Government from treating differently different classes of British subjects.

(2) All laws, statutes and ordinances made by the Legislature of a British Possession for imparting to any person any of the privileges of naturalization to be enjoyed by him within the limits of that Possession, shall, within those limits, have the authority of law.

(3) Where any parts of His Majesty's Dominions are under both a central and a local legislature, the expression "British Possession" shall, for the purposes of this section, include both all parts under the central legislature and each part under a local legislature: Provided that nothing in this provision shall be construed as validating any law, statute or ordinance with respect to naturalization made by any such local legislature in any case where the central legislature possesses exclusive legislative authority with respect to naturalization.

(*ss*) Cf. *Fourdrin v. Gowdey* (1834), 3 My. & K. 383.

(*t*) For forms of petition and of letters patent, see *Ency. of Forms*, vol. ix. pp 33, 34.

Section 27.—(1) In this Act, unless the context otherwise requires,—

PART I.
PERSONS.

CAP. I.

Definitions.

The expression “ British subject ” means a person who is a natural-born British subject, or a person to whom a certificate of naturalization has been granted, or a person who has become a subject of His Majesty by reason of any annexation of territory :

The expression “ alien ” means a person who is not a British subject :

The expression “ certificate of naturalization ” means a certificate of naturalization granted under this Act or under any Act repealed by this or any other Act :

The expression “ disability ” means the status of being a married woman, or a minor, lunatic, or idiot :

The expression “ territorial waters ” includes any port, harbour, or dock :

The expression “ British Consulate ” means the office of any British consular officer where a register of births is kept, and includes, in the case of any territory where there is no British consulate and there is a British resident or other representative of His Majesty, the office of such resident or representative.

(2) Where in pursuance of this Act the name of a child is included in a certificate of naturalization granted to his parent, or where, in pursuance of any Act repealed by this Act, any child has been deemed to be a naturalized British subject by reason of residence with his parent, such child shall, for the purposes of this Act, be deemed to be a person to whom a certificate of naturalization has been granted.

Section 28.—(1) The enactments mentioned in the Third Schedule to this Act are hereby repealed to the extent specified in the third column of that schedule.

Repeal,
short title,
and com-
mencement.

(2) This Act may be cited as the British Nationality and Status of Aliens Act, 1914.

(3) This Act shall come into operation on the first day of January nineteen hundred and fifteen.

PART I.
PERSONS.

CAP. I.

Sections 8,
9, 19.

SCHEDULES.

FIRST SCHEDULE.

LIST OF DOMINIONS.

The Dominion of Canada.

The Commonwealth of Australia (including for the purposes of this Act the territory of Papua and Norfolk Island).

The Dominion of New Zealand.

The Union of South Africa.

Newfoundland.

SECOND SCHEDULE.

Section 24.

OATH OF ALLEGIANCE.

"I, *A.B.*, swear by Almighty God that I will be faithful and bear true allegiance to His Majesty, King George the Fifth, his Heirs and Successors, according to law."

THIRD SCHEDULE.

Section 28.

ENACTMENTS REPEALED.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
25 Edw. 3. stat. 1.	Statute for those who are born in parts beyond the seas.	From "and in the right of other children" to the end of the statute.
42 Edw. 3. c. 10.	A statute made at Westminster on the first day of May in the forty-second year of King Edward III.	The whole chapter.
12 & 13 Will. 3. c. 2.	The Act of Settlement.	In section three the words "naturalized or."
7 Anne, c. 5.	The Foreign Protestants (Naturalization) Act, 1708.	The whole Act.
4 Geo. 2. c. 21.	The British Nationality Act, 1730.	The whole Act.
13 Geo. 3. c. 21.	The British Nationality Act, 1772.	The whole Act.
33 & 34 Vict. c. 14.	The Naturalization Act, 1870.	The whole Act.
33 & 34 Vict. c. 102.	The Naturalization Oath Act, 1870.	The whole Act.
58 & 59 Vict. c. 43.	The Naturalization Act, 1895.	The whole Act.

STATUTORY RULES AND ORDERS,

1914, No. 1861, *as amended by* 1918, No. 1488; 1919,
No. 1552; 1920, No. 1864, *and* 1922, No. 447.

BRITISH NATIONALITY AND STATUS OF ALIENS.

THE NATURALIZATION REGULATIONS.

BEING REGULATIONS, DATED DECEMBER 30, 1914, MADE BY THE SECRETARY OF STATE UNDER SECTION 19 OF THE BRITISH NATIONALITY AND STATUS OF ALIENS ACT, 1914 (4 & 5 GEO. 5, C. 17), AS AMENDED BY THE NATURALIZATION REGULATIONS, 1918 (DATED OCTOBER 23, 1918), THE NATURALIZATION REGULATIONS, 1919 (DATED OCTOBER 18, 1919), THE NATURALIZATION REGULATIONS, 1920 (DATED SEPTEMBER 29, 1920), AND THE NATURALIZATION REGULATIONS, 1922 (DATED APRIL 12, 1922).

1. A certificate of naturalization granted in the United Kingdom shall, save as otherwise hereinafter prescribed, be in one of the following forms:—

Form of
certificate of
naturaliza-
tion in the
United
Kingdom.

(A) *Where the names of children are not included.*

BRITISH NATIONALITY AND STATUS OF ALIENS ACT, 1914.

Certificate of Naturalization.

Whereas *A.B.* has applied for a certificate of naturalization, alleging with respect to himself [herself] the particulars set out below, and has satisfied me that the conditions laid down in the above-mentioned Act for the grant of a certificate of naturalization are fulfilled in his [her] case:

Now, therefore, in pursuance of the powers conferred on me by the said Act, I grant to the said *A.B.* this certificate of naturalization, and declare that upon taking the oath of allegiance within the time and in the manner required by the regulations made in that behalf he [she] shall, subject to the provisions of the said Act, be entitled to all political and other rights powers and privileges, and be subject to all obligations duties and liabilities, to which a natural-born British subject is entitled or subject, and have to all intents and purposes the status of a natural-born British subject.

In witness whereof I have hereto subscribed my name this
day of

(Signed) *E.F.*,

(*One of His Majesty's Principal Secretaries of State.*)

PART I.
PERSONS.

CAP. I.

Particulars relating to Applicant.

Full name
 Address
 Trade or Occupation
 Place and date of birth
 Nationality
 Married, single, widower, or widow
 Name of wife or husband
 Names and nationality of parents

(B) *Where the names of children are included.*

BRITISH NATIONALITY AND STATUS OF ALIENS ACT, 1914.

Certificate of Naturalization.

Whereas *A.B.* has applied for a certificate of naturalization, alleging with respect to himself [herself] the particulars set out below, and has satisfied me that the conditions laid down in the above-mentioned Act for the grant of a certificate of naturalization are fulfilled in his [her] case :

And whereas the said *A.B.* has also applied for the inclusion in accordance with subsection (1) of section five of the said Act of the names of certain of his [her] children born before the date of this certificate and being minors, and I am satisfied that the names of his [her] children, as hereinafter set out, may properly be included :

Now, therefore, in pursuance of the powers conferred on me by the said Act, I grant to the said *A.B.* this certificate of naturalization, and declare that upon taking the oath of allegiance within the time and in the manner required by the regulations made in that behalf he [she] shall, subject to the provisions of the said Act, be entitled to all political and other rights powers and privileges, and be subject to all obligations duties and liabilities, to which a natural-born British subject is entitled or subject, and have to all intents and purposes the status of a natural-born British subject.

And I further declare that this certificate extends to the following children, born before the date of this certificate and being minors, of the said *A.B.* :—

[*Here insert names and dates of birth of children.*]

In witness whereof I have hereto subscribed my name this day of

(Signed) *E.F.*,

(*One of His Majesty's Principal Secretaries of State.*)

Particulars relating to Applicant.

Full name
 Address
 Trade or Occupation
 Place and date of birth
 Nationality
 Married, single, widower, or widow
 Name of wife or husband
 Names and nationality of parents

2.—(1) A special certificate of naturalization granted in the United Kingdom under section four of the Act to a person with respect to whose nationality as a British subject a doubt exists, shall be in the following form:—

PART I.
PERSONS.
CAP. I.

Form of
special certi-
ficate in
case of
doubt.

BRITISH NATIONALITY AND STATUS OF ALIENS ACT, 1914.

Special Certificate of Naturalization granted to a person with respect to whose nationality as a British Subject a doubt exists.

Whereas *A.B.*, with respect to whose nationality as a British subject a doubt exists, has applied for such a special certificate of naturalization as is provided for by section four of the above-mentioned Act, alleging with respect to himself [herself] the particulars set out below:

And whereas I am satisfied that such a certificate may properly be granted:

Now, therefore, in pursuance of the powers conferred on me by the said Act, and for the purpose of quieting doubts as to the right of the said *A.B.* to be a British subject, I grant the said *A.B.* this special certificate of naturalization, and declare that upon taking the oath of allegiance within the time and in the manner required by the regulations made in that behalf he [she] shall, subject to the provisions of the said Act, be entitled to all political and other rights powers and privileges, and be subject to all obligations duties and liabilities to which a natural-born British subject is entitled or subject, and have to all intents and purposes the status of a natural-born British subject.

In witness whereof I have hereto subscribed my name this day of

(Signed) *E.F.*,

(*One of His Majesty's Principal Secretaries of State*).

Particulars relating to Applicant.

Full name
Address
Trade or Occupation
Place and date of birth
Married, single, widower, or widow
Name of wife or husband
Names and nationality of parents

(2) Where the names of children are to be included paragraphs corresponding to the second and fourth paragraphs of Form (B) prescribed by Regulation 1 shall be inserted in the certificate.

3. A certificate of naturalization granted in the United Kingdom to a minor under subsection (2) of section five of the Act shall be in the following form:—

Form of
certificate of
naturaliza-
tion for
minors.

BRITISH NATIONALITY AND STATUS OF ALIENS ACT, 1914.

Certificate of Naturalization granted to a Minor.

Whereas an application has been made for the grant of a certificate of naturalization to *A.B.*, a minor, alleging with respect to the said *A.B.* the particulars set out below:

PART I.
PERSONS.

CAP. I.

And whereas I am satisfied that such a certificate may properly be granted :

Now, therefore, in pursuance of the powers conferred on me by the said Act, I grant to the said *A.B.* this certificate of naturalization, and declare that upon taking the oath of allegiance within the time and in the manner required by the regulations made in that behalf he [she] shall, subject to the provisions of the said Act, be entitled to all political and other rights powers and privileges, and be subject to all obligations duties and liabilities, to which a natural-born British subject is entitled or subject, and have to all intents and purposes the status of a natural-born British subject.

In witness whereof I have hereto subscribed my name this day of

(Signed) *E.F.*,

(*One of His Majesty's Principal Secretaries of State*).

Particulars relating to Applicant.

Full name
Address
Trade or Occupation
Place and date of birth
Nationality
Names and nationality of parents

Form of
certificate in
the case of
persons pre-
viously
naturalized.

4.—(1) A certificate of naturalization granted in the United Kingdom under section six of the Act to a person who was naturalized before the passing of the Act, shall be in the following form:—

BRITISH NATIONALITY AND STATUS OF ALIENS ACT, 1914.

Certificate of Naturalization granted to a Person who was naturalized before the passing of the above-mentioned Act.

Whereas *A.B.*, who was naturalized before the passing of the above-mentioned Act, has applied for a certificate of naturalization under the said Act, alleging with respect to himself [herself] the particulars set out below :

And whereas I am satisfied that such a certificate may properly be granted :

Now, therefore, in pursuance of the powers conferred on me by the said Act, I grant to the said *A.B.* this certificate of naturalization, and declare that upon taking the oath of allegiance within the time and in the manner required by the regulations made in that behalf he [she] shall, subject to the provisions of the said Act, be entitled to all political and other rights powers and privileges, and be subject to all obligations duties and liabilities, to which a natural-born British subject is entitled or subject, and have to all intents and purposes the status of a natural-born British subject.

In witness whereof I have hereto subscribed my name this day of

(Signed) *E.F.*,

(*One of His Majesty's Principal Secretaries of State*).

Particulars relating to Applicant.

PART I.
PERSONS.
CAP. I.

Full name
Address
Trade or Occupation
Place and date of birth
Nationality
Married, single, widower, or widow
Name of wife or husband
Names and nationality of parents
Date of previous naturalization

(2) Where the names of children are to be included paragraphs corresponding to the second and fourth paragraphs of Form (B) prescribed by Regulation 1 shall be inserted in the certificate.

4A.—(1) A certificate of naturalization granted in the United Kingdom under section ten of the Act to a woman who is the wife of a subject of a State at war with His Majesty shall be in the following form:—

BRITISH NATIONALITY AND STATUS OF ALIENS ACTS, 1914—1918.

Certificate of Naturalization granted to a woman who was at birth a British subject and is married to a subject of a State at war with His Majesty.

Whereas A.B., of has applied for a certificate of naturalization alleging with respect to herself the particulars set out below and has satisfied me that she was at birth a British subject and is the wife of an alien who is a subject of a State at war with His Majesty and that the conditions laid down in the above-mentioned Acts for the grant of a certificate of naturalization are fulfilled in her case:

And whereas I am satisfied that such a certificate may properly be granted:

Now, therefore, in pursuance of the powers conferred on me by the said Acts, I grant to the said A.B. this certificate of naturalization, and declare that upon taking the oath of allegiance within the time and in the manner required by the regulations made in that behalf she shall, subject to the provisions of the said Acts, be entitled to all political and other rights powers and privileges, and be subject to all obligations duties and liabilities to which a natural-born British subject is entitled or subject, and have to all intents and purposes the status of a natural-born British subject.

In witness whereof I have hereto subscribed my name this day of

(Signed) E.F.,

(*One of His Majesty's Principal Secretaries of State.*)

Particulars relating to Applicant.

Full name
Address
Trade or Occupation
Place and date of birth
Nationality
Name of husband
Names and nationality of parents

PART I.
PERSONS.

CAP. I.

Certificate of
naturaliza-
tion in
British Pos-
session other
than India
and self-
governing
Dominions.

(2) Where the names of children are to be included paragraphs corresponding to the second and fourth paragraphs of form (B) prescribed by Regulation 1 shall be inserted in the certificate.

5.—(1) A certificate of naturalization granted in a British Possession, other than British India or a Dominion specified in the First Schedule to the Act, shall be in the same form as a certificate granted in the United Kingdom, except that instead of being signed by the Secretary of State it shall be signed by the Governor of the Possession, or a person acting under his authority.

(2) Where any certificate of naturalization proposed to be so granted in a British Possession, having been submitted to the Secretary of State for his approval, is approved by him, his approval shall be signified by appending to the certificate a note to the following effect:—

This certificate has been submitted to me for my approval and approved by me.

(Signed) E.F.,

(*One of His Majesty's Principal Secretaries of State*).

Form of
declaration
of alienage.

6. A declaration of alienage shall be in the following form, the various alternatives being used according to the circumstances:—

BRITISH NATIONALITY AND STATUS OF ALIENS ACT, 1914.

Declaration of Alienage.

I, *A.B.*, of _____, being the son [daughter] of an alien to whom a certificate of naturalization has been granted, in which certificate of naturalization, in accordance with subsection (1) of section five of the above-mentioned Act, my name was included, and having attained my majority within one year before the present date [*or, being a person who, by reason of my having been born within His Majesty's Dominions and allegiance, [or on Board a British ship], am a natural-born British subject, but who at my birth, [during my minority], became under the law of _____ a subject also of that State, and am still such a subject, and of full age and not under disability], [or, being a natural-born British subject, who was born out of His Majesty's Dominions and being of full age and not under disability], [or, having been originally a subject or citizen of _____ being a State with which His Majesty has by Order in Council declared that he has entered into such a convention as is mentioned in section fifteen of the above-mentioned Act, and having been naturalized as a British subject], [or, being the wife of *A.B.* a person whose certificate of naturalization has been revoked within six months before the present date and being also the mother of the following minor children of the marriage of the said *A.B.* and myself, namely. _____], do hereby renounce my nationality as a British subject.*

(Signed) *A.B.*,

Made and subscribed this _____ day of _____ before me,

(Signed) *X.Y.*,

[*Justice of the Peace, Commissioner,
or other official title*].

7. A declaration of retention of British nationality under section ten of the Act, by the wife of a man ceasing during the continuance of his marriage to be a British subject, shall be in the following form:—

PART I.
PERSONS.
CAP. I.

BRITISH NATIONALITY AND STATUS OF ALIENS ACT, 1914.

Declaration of Retention of British Nationality.

I, A.B., of , being the wife of who, during the continuance of my marriage to him, namely, on or about the day of nineteen hundred and , has ceased to be a British subject, hereby declare that I desire to retain British nationality.

Form of
declaration
of retention
of British
nationality.

(Signed) A.B.,

Made and subscribed this day of before me,

(Signed) X.Y.,

[Justice of the Peace, Commissioner,
or other official title].

8. A declaration of resumption of British nationality under section twelve of the Act, by a person who has ceased to be a British subject upon his parent ceasing during the minority of that person to be a British subject, shall be in the following form:—

Form of
declaration
of resump-
tion of
British
nationality.

BRITISH NATIONALITY AND STATUS OF ALIENS ACT, 1914.

Declaration of Resumption of British Nationality.

I, A.B., of , having ceased to be a British subject during my minority, by reason of my father [mother] having ceased to be a British subject, and having attained my majority within one year before the present date, hereby declare that I wish to resume British nationality.

(Signed) A.B.,

Made and subscribed this day of before me,

(Signed) X.Y.,

[Justice of the Peace, Commissioner,
or other official title].

9.—(1) Every certificate of naturalization granted in the United Kingdom and every oath of allegiance relating to any such certificate shall be registered in London at the Home Office.

(2) Every certificate of naturalization granted in a British Possession, other than British India or a Dominion specified in the First Schedule to the Act, and every oath of allegiance relating to any such certificate, shall be registered both in London at the Home Office and in the Possession at such place as the Governor of the Possession may direct.

Registration
of certificates
of natural-
ization and
oaths of
allegiance.

PART I.
PERSONS.

CAP. I.

Oath of
allegiance.

10.—(1) The following persons may administer the oath of allegiance:—

In England or Ireland—

Any justice of the peace or any commissioner authorized to administer oaths in the Supreme Court.

In Scotland—

Any sheriff, sheriff-substitute, or justice of the peace.

In a British Possession—

Any judge of any court of civil or criminal jurisdiction, any justice of the peace, or any officer for the time being authorized by law, in the place in which deponent is, to administer an oath for any judicial or other legal purpose.

In any British Protectorate or British protected state—

Any officer for the time being authorised by law in that territory to administer an oath for any judicial or other legal purpose.

Elsewhere—

Any officer in the diplomatic or consular service of His Majesty.

(2) The oath of allegiance shall be subscribed as well as taken, and the form in which the oath of allegiance is subscribed and attested shall be as follows:—

I, *A.B.*, swear by Almighty God that I will be faithful and bear true allegiance to His Majesty, King George the Fifth, His Heirs and Successors, according to law.

(Signed) *A.B.*,

Sworn and subscribed this day of before me,

(Signed) *X.Y.*,

*[Justice of the Peace, Commissioner,
or other official title].*

(3) The oath of allegiance sworn subscribed and attested as herein directed shall in every case be endorsed on the certificate of naturalization to which it relates.

(4) The oath of allegiance may be proved in any legal proceedings by the production of the original certificate or any copy thereof certified to be a true copy by the Secretary of State or by any person authorised by him in that behalf or, where the oath has been administered in a British Possession, by the Governor of the Possession.

Time within
which oath
of allegiance
to be taken.

11. The oath of allegiance shall be taken within one calendar month after the date of the certificate of naturalization to which it relates, or within such extended time as the Secretary of State or, in the case of a certificate granted in a British Possession, the Governor of the Possession, may direct, and if the oath is not so taken the certificate shall not take effect.

Registration
of declara-
tions.

12.—(1) Every declaration of alienage and declaration of retention or resumption of British nationality, wherever made, shall be registered in London at the Home Office.

(2) Every such declaration made in a British Possession, other than British India or a Dominion Specified in the First Schedule to the

Act, shall also be registered at such place in the Possession as the Governor of the Possession may direct.

PART I.
PERSONS.

CAP. I.

13. The persons before whom declarations of alienage and declarations of resumption or retention of British nationality may be made, shall be the same as the persons by whom the oath of allegiance may be administered.

Persons
before whom
declarations
may be
made.
Fees.

14. The following fees, to which the consent of the Treasury has been obtained, may be taken and shall be applied in the manner hereinafter shown; but this regulation shall not be in force in any British Possession.

TABLE OF FEES.

The matter in which the Fee may be taken.	The Amount of the Fee.	To whom payment of the Fee to be made.
The grant of a certificate of naturalization to a woman who was a British subject previously to her marriage to an alien, and the registration of the certificate and the oath of allegiance in respect thereof.	£ s. d. 0 5 0	Into the Exchequer in accordance with Treasury directions.
The grant of a certificate of naturalization in other cases, and the registration of the certificate and the oath of allegiance in respect thereof.	10 0 0	The same.
Taking a declaration of alienage or of retention or resumption of British nationality.	0 2 6	In England or Ireland if the declaration is taken or the oath administered by a justice of the peace, to the clerk to the justices, and if by a Commissioner, to the Commissioner.
Administering the oath of allegiance.		In Scotland if the declaration is taken or oath administered by a sheriff or sheriff-substitute, to the sheriff clerk, or to any of his deputed; if by a justice of the peace, to the clerk of the peace or to any of his deputed.
The registration of a declaration of alienage or of retention or resumption of British nationality.	0 10 0	Into the Exchequer in accordance with Treasury directions.
Certified copy of any declaration or certificate with or without oath.	0 10 0	The same.

Of the fee of £10 payable in respect of the grant of a certificate of naturalization, £1 shall be payable on the submission of the application for a certificate, and shall in no circumstances be returned; the remaining £9 shall be payable on the receipt of the decision to grant a certificate.

15. All regulations made under any enactment repealed by the Act are hereby revoked but without prejudice to anything done thereunder. Revocation.

16. These regulations may be cited as the Naturalization Regulations. Short title.

PART I.
PERSONS.

CAP. I.

Nationality
distinct from
domicil.

It will be seen that all the legislation which has taken place on this subject proceeds on the principle that a man is unable of himself, without statutory assistance, to change his nationality. In the words of Lord Hatherley in *Udny v. Udny* (u), "the question of naturalization and allegiance is distinct from that of domicil. A man cannot, at present at least, put off and resume at will obligations of obedience to the Government of the country of which at his birth he is a subject, but he may many times change his domicil." The Act has rendered that possible which was not so, at least in England, when Lord Hatherley spoke, but the essential distinction between domicil and nationality must nevertheless be borne in mind in considering its provisions. In *Moorhouse v. Lord* (x), Lord Kingsdown, speaking of the acquisition of a French domicil, is reported as saying that, in order to effect such a result, a man must intend *to become a Frenchman instead of an Englishman*. But, as Lord Westbury points out, in his judgment in the case of *Udny v. Udny* (y), just referred to, these words are likely to mislead, if they were intended to signify that for a change of domicil there must be a change of nationality, that is, of natural allegiance. That would be "to confound the political and civil states of an individual, and to destroy the difference between *patria* and *domicilium*." This essential distinction will become more manifest, when the law of domicil has been considered.

(u) (1869), L. R. 1 H. L., Sc. 441, 452.

(x) (1863), 10 H. L. C. 272. And see *Haldane v. Eckford* (1869), L. R. 8 Eq. 631; *In re Capdevielle* (1864), 2 H. & C. 985; and *Att.-Gen. v. Countess de Waldstatt* (1864), 3 H. & C. 374.

(y) (1869), L. R. 1 H. L., Sc. 460.

CHAPTER II.

DOMICIL.

PART I.
PERSONS.

CAP. II.

Domicil—
defined and
explained.

By the law of England, and of all other civilised countries, each individual has ascribed to him at his birth two distinct legal status or conditions : one by virtue of which he becomes the *subject* of some particular country, binding him by the tie of natural allegiance, which is called his political status or nationality, and which has been discussed in the preceding chapter ; the other, by virtue of which he becomes the *citizen* of some particular country, as such possessed of certain municipal rights, and subject to certain obligations. This is called his civil status, entirely distinct from the first, which depends on different laws in different countries ; whereas the civil status is governed universally by the single principle of *domicil*, the criterion established by international law for determining it (a). As to the proper definition of domicil, much difficulty has always been felt (b). Sir R. J. Phillimore defines it, on the basis of *dicta* from American judges, as “ a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time ” (c). There can be no doubt that this is the *kind* of residence which is essential to domicil, but the conception itself may be, perhaps, more accurately explained as *the relation of an individual to a particular State which arises from his residence within its limits as a member of its community*. There must be always one particular State towards which this relation exists, and there can never be more than one at the same time (d). The assertion that domicil is the “ legal conception of residence,” particularised and defined only for the sake of legal precision, is not entirely satisfactory, as residence is not domicil, unless accompanied by the particular circumstances under which

(a) Per Lord Westbury in *Udny v. Udny* (1869), L. R. 1 H. L., Sc. 460.

(b) For a consideration of various definitions proposed, see Dicey, *Conflict of Laws* (1922), pp. 790-799.

(c) Phillimore, *International Law*, vol. iv., sect. 49. Adopted by Lord Westbury in *Udny v. Udny* (1869), L. R. 1 Sc. App. 441. In *Bell v. Kennedy* (1868), L. R. 1 H. L., Sc. 307, the same judge said that domicil was “ the relation which the law creates between an individual and a particular locality or country ” ; which is said in *Abd-ul Messih v. Farra* (1887), 13 App. Cas. 431 ; 57 L. J. P. C. 91, to be more accurate.

(d) As to the possibility of a double domicil, see *Somerville v. Somerville* (1801), 5 Ves. 749. Cf. Story, *Conflict of Laws*, § 45.

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Kinds of
domicil.Domicil of
origin.

the law will recognise it (*e*). What those circumstances are, is just the question which it is the object of definition to answer. Where a man resides is always a matter of fact (*f*), and when this fact is once ascertained, the legal idea of domicil comes at once into existence. There must therefore be a territory or country with which to associate the idea of *domicil*; and mere residence in a community, exempt from the real local jurisdiction (as at Shanghai in China), will not do (*g*); that is, domicil refers to the relation between a person and a particular locality, and not to his membership of a community, as distinguished from the territory in which the community dwells.

Every person at birth acquires a domicil, and possesses some domicil or other at every period of his life; and, further, no one can have more than a single domicil at one time, at all events under one set of particular circumstances and for the same purpose.

The domicil which the law attributes to a person at birth is termed the domicil of origin. The latter may be afterwards changed by him, and a new one may be acquired, which is called a domicil of choice. Commercial or trade domicil has reference rather to public international law than to civil status, and arises in time of war.

The domicil which attaches to a man at the moment of his birth, generally spoken of as the domicil of origin, is in ordinary cases that of his father; though where a child is posthumous or illegitimate (*h*) the domicil of its mother is necessarily taken to decide its own. Cases can of course be suggested where the domicil must be decided by the place of birth, or even some other place; as, for instance, in the case of a child found exposed, whose parents are unknown. In the latter case the presence of the foundling in a given place is the only evidence obtainable of his domicil of origin (*i*). Where the parents are known, however, the place of birth or the place where the child is found is immaterial (*k*). In ordinary cases, however, the domicil of origin

(*e*) Cf. *Maltass v. Maltass* (1844), 1 Roberts, 74; *Munro v. Munro* (1840), 7 Cl. & F. 842.

(*f*) *Bempde v. Johnstone* (1796), 3 Ves. Jun. 201.

(*g*) *Tootal's Trusts* (1883), 23 Ch. D. 532. "Residence in a territory or country is an essential part of the legal idea of domicil": per Chitty, J., at p. 538. The same was held in *Abd-ul Messih v. Farra* (1887), 13 App. Cas. 431; 57 L. J. P. C. 78. And per Chitty, J., in *re Craignish* (1892), 3 Ch. 180, "The domicil of a person is that place or country in which his habitation is fixed, without any present intention of removing therefrom."

(*h*) If, however, an illegitimate child have a father whose paternity is fixed, by acknowledgment or otherwise, the domicil of that father attaches to it: *Re Wright's Trusts* (1856), 2 K. & J. 595. With regard to a posthumous child, cf. *Van Matre v. Sankey* (1893), 39 Amer. State Rep. 196; and as to an illegitimate child, see *Urquhart v. Butterfield* (1887), 37 Ch. D. 357 (C. A.).

(*i*) *Bempde v. Johnstone* (1796), 3 Ves. 198.

(*k*) *Somerville v. Somerville* (1801), 5 Ves. 749, at p. 786.

is that of one of the parents, and during legal infancy it changes with that from which it is derived. Some writers have pointed out that a married minor must be regarded as *sui juris* for the purposes of domicile, since on his or her marriage a new home is founded. In such a case the question would appear to be one of fact, and if the minor, after the ceremony of marriage, continued to reside with his or her parents, there would be no occasion to consider it, inasmuch as there would be only one locality to which the domicile could possibly be attributed. It is doubtful whether the married minor's setting up of a separate establishment puts him in the position of one *sui juris*; for, in the first place, the assertion in the affirmative involves a confusion between domicile and residence, and, secondly, it is not supported by English law, which does not alter an infant's contractual liability in the event of his marriage. Further, it is doubtful whether an infant engaging in trade may acquire a domicile for himself, as has been suggested (*l*). It is probable that the domicile of an orphan may be decided by that of its legal guardian, and when this test cannot be applied, it becomes a question of the place where the child in fact resides. A doubt has, however, been raised, whether the legal guardian of an infant can change its domicile, with the effect in many cases of bringing it under the influence of a law of succession more favourable to himself. It is quite clear that when that guardian is a surviving mother, or even, it would seem, a step-mother, and there is no suggestion of fraudulent intention, the change can effectively be made (*m*). But if the mother marries again, and probably even without this contingency, the question appears to be one of fact, the mother having the power of changing the infant's domicile, or of abstaining from so doing (*n*). A new domicile so acquired by an infant is not equivalent to a domicile of origin; *i.e.* it does not revert on any subsequent abandonment of the domicile acquired.

In cases other than those of parent and child, there is more doubt, and Story suggests that it is extremely difficult to find any reasonable principle by which a guardian, not a parent, can alter by a change of domicile, the right of succession to the minor's property. English law is barren of authority on the subject (*o*). In *Douglas v. Douglas* (*p*), Wickens, V.-C., questioned the capacity of a guardian to effect such an alteration: "It seems doubtful whether a guardian can change an infant's domicile. The difficulty is that a person may be guardian in one place and

(*l*) Cf. *Stephens v. McFarland* (1845), 8 I. Eq. R. 444.

(*m*) *Pottinger v. Wightman* (1817), 3 Meriv. 67.

(*n*) *In re Beaumont*, [1893] 3 Ch. 490; *In re Craignish*, [1892] 3 Ch. 180.

(*o*) Story, § 506, n.

(*p*) (1871), L. R. 12 Eq. 617, 625.

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not in another." If the ward's residence is not, in fact, that of the guardian, it is unlikely that a Court, if it should have to decide the question, would confer this power on the guardian. It may be here pointed out that according to continental practice, which differs from English and American (*q*), the minor's domicile is usually held to be fixed by the father's death, and during minority it can be changed only by act of law, and not merely by the mother or guardian. This rule, being more simple and definite, will probably come to be adopted also by our Courts.

In *Crumpton's Judicial Factor v. Finch-Noyes* (*r*), where the widow, born in Scotland, abandoned her matrimonial domicile in Barbadoes and returned to Scotland bringing her infant son with her (who lived with her for six years), it was held that the mother having re-acquired her domicile of origin in Scotland transmitted it to her infant son.

The inquiry as to what is sufficient to change the domicile of adults is a more fruitful one, and has given rise to a mass of litigation.

Domicil by
acquisition.

The domicile of origin adheres until a new domicile is acquired (*s*), and in the case of an adult this change is effected by a *de facto* removal to a new place of residence, together with an *animus manendi* (*t*). As to the *factum* of removal, it is apparently now settled by the case of *Udny v. Udny* (*u*) that a new domicile is not acquired until the transit is complete, and that when a domicile of choice is abandoned, the domicile of origin revives until a new one is completely fixed. In Lord Hatherley's words in the case cited, a man may not only change his domicile, but also abandon each successive domicile *simpliciter*, so that the original domicile *simpliciter* reverts; and this doctrine was accepted and approved by the Master of the Rolls (Sir G. Jessel) in the later case of *King v. Foxwell* (*x*). In the absence of evidence the domicile of origin must of course be presumed to have continued, so that the burden of evidence will be on the party who alleges its abandonment (*y*). If the domicile of origin reverts when an acquired domicile is abandoned without a new one being acquired, it would naturally follow that, with regard

Abandon-
ment and
transit.

(*q*) Cf. the American cases, *School Directors v. James*, 2 Watts & Serg. 568; *Holyoake v. Huskins*, 5 Pick. 20; *White v. Howard*, 52 Barb. 294.

(*r*) [1918] S. C. 518.

(*s*) *Bell v. Kennedy* (1868), L. R. 1 H. L., Sc. 307; *Udny v. Udny* (1869), *ibid.* 460.

(*t*) *The Lauderdale Peerage* (1885), 10 App. Cas. 692; *Douglas v. Douglas* (1871), L. R. 12 Eq. 617; *Haldane v. Eckford* (1869), L. R. 8 Eq. 631; *De Bonneval v. De Bonneval* (1838), 1 Curt. 864.

(*u*) L. R. 1 H. L., Sc. 460.

(*x*) (1876), L. R. 1 Ch. D. 518.

(*y*) *Crookenden v. Fuller* (1859), 29 L. J. P. & M. 1; *The Lauderdale Peerage* (1885), 10 App. Cas. 692; *Winans v. Att.-Gen.*, [1904] A. C. 287; *Aikman v. Aikman* (1861), 3 Macq. 854, H. L.

to the domicile of origin itself, mere abandonment is not sufficient to divert it. In other words, a domicile of origin cannot be abandoned unless and until a new one is acquired. Accordingly it was held by Lord Alvanley, in *Somerville v. Somerville* (z), whose judgment is cited with approval by Sir C. Cresswell in *Crookenden v. Fuller* (a), that “the original domicile is to prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile and taking another as his sole domicile”—a *dictum* the peculiar wording of which is due to the fact that in *Somerville v. Somerville* the Court was called upon to lay down that for purposes of succession a man can have but one domicile. That mere abandonment was not in any case sufficient to divert domicile had been held by Sir John Leach in *Munro v. Douglas* (b). The *dicta*, however, in *Udny v. Udny* and *King v. Foxwell* must now be taken as decisive of the question. Mere abandonment divests all domiciles except that of origin. The domicile of origin of necessity adheres until a new one is acquired, as, if this were not so, the man who had left the country of his home for the first time would be left *in itinere* without any domicile at all, a condition of things which cannot possibly exist. But the abandonment of the acquired domicile must of course be complete; and it has been held that a French domicile by acquisition is not so abandoned by mere embarkation on a vessel bound for England, the person in question being compelled by ill-health to re-land, and having never in fact quitted the French harbour (c). Abandonment, to be effectual, requires both the element of fact and that of intention; so that an Englishman, having acquired a domicile of choice in Germany, and temporarily returning to England with the intention of going back to reside permanently in Germany, was not divested of his German domicile (d). And it would *a fortiori* seem that a mere intention to abandon an acquired domicile, even with the view of reverting to an original domicile, is ineffectual. “If a man loses his domicile of choice, then, without anything more, his domicile of origin revives; but, in my opinion, in order to lose the domicile of choice once acquired, it is not only necessary that a man should be dissatisfied with his domicile of choice, and form an intention to leave it, but he must have left it, with the intention of leaving it permanently. Unless he has done that,

(z) (1801), 5 Ves. 786.

(a) 29 L. J. P. & M. 8. See *Munro v. Munro* (1840), 7 Cl. & F. 842; *Collier v. Rivaz* (1841), 2 Curt. 855; *Hodgson v. De Beauchesne* (1858), 12 Moo. P. C. 285.

(b) (1820), 5 Madd. 405.

(c) *In the Goods of Raffanel* (1863), 32 L. J. P. & M. 203.(d) *Re Steer* (1858), 28 L. J. Ex. 22; 3 H. & N. 594.

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*Animus
relinquendi.*

unless he has left it both *animo et facto*, the domicile of choice remains " (e).

Accompanying the *factum* there must necessarily be an *animus relinquendi*, or the abandonment would be in reality no abandonment at all. It is this *animus* which constitutes the whole difference between mere absence from the domicile and its relinquishment; and while a man may divest himself of an acquired domicile in an hour by crossing the territorial limit of the State with the intention of permanently quitting it, he may, without such intention, wander over the face of the earth for years and preserve his domiciliary status unaffected. Subsequent declarations will of course be received as evidence that this *animus relinquendi* was absent when the country of the domicile was quitted, as in the cases of *Jopp v. Wood* (f) and *In re Capdevielle* (g); and it is clear that proof of an *animus manendi* in the country of the new home will conclusively establish the intention to abandon the old. If, however, it is shown that the *animus relinquendi* or *non revertendi* never came into existence, as in the case of political refugees and exiles (h), it is of course unnecessary to inquire further. The *animus relinquendi* is in practice almost identical with the *animus manendi*, when the latter exists; and it is only in cases of mere abandonment, according to the principle stated in *Udny v. Udny* (i), that the consideration of the former by itself is necessary or practicable.

In *Drexel v. Drexel* (k), Mr. and Mrs. Drexel, American by origin, became domiciled in England, and after twenty years' residence together separated under a deed of separation and set up separate establishments. Mr. Drexel desiring to obtain a divorce in France, in June, 1915, closed his establishment in England, proceeded to Paris, acquired the right of domicile in France for a limited number of years and instituted divorce proceedings in France. In July, 1915, Mrs. Drexel issued a writ against Mr. Drexel to enforce the provisions of the separation order. Mr. Drexel moved to set aside the writ on the ground that he was not domiciled or ordinarily resident in England at the date of the issue of the writ. From those facts Neville, J., drew the inference that Mr. Drexel took those steps solely for the

(e) *In re Marrett, Chalmers v. Wingfield* (1887), 36 Ch. D. 400 (C. A.), at p. 407, per Cotton, L.J.

(f) (1865), 34 L. J. Ch. 212.

(g) (1864), 33 L. J. Ex. 306. It would hardly seem to require authority to show that statements by a deceased person to show the *animus manendi* or *relinquendi* are admissible as evidence; but for express dicta on the point, see *Doucet v. Geoghegan* (1878), 9 C. D. 455; *Hodgson v. De Beauchesne* (1858), 12 Moo. P. C. 325.

(h) *Collier v. Rivaz* (1841), 2 Curt. 858; *De Bonneval v. De Bonneval* (1838), 1 Curt. 856; *Burton v. Fisher* (1828), 1 Milw. 183.

(i) L. R. 1 H. L. Sc. 452; ante, p. 80.

(k) [1916] 1 Ch. 251.

purpose of the divorce, and that beyond that he had no intention of changing his place of residence or abandoning his English domicile, but so far as was necessary for the purpose of succeeding in the intentions which he had expressed he had no doubt that Drexel did intend to sever himself as completely from his English residence as he could, and also from his English domicile. The learned Judge came to the conclusion that Mr. Drexel was only doing what he had a right to do, and inasmuch as the purpose for which he was acting showed that it was advisable for him to do so, he did intend to sever his connection with this country, for the time at all events, completely, and that he had ceased to be resident in England on 3rd July, 1915, and that it could not be said that his domicile of choice in England endured after his application for domicile in France, because a man is entitled to judge for himself and to make his domicile in such a country as pleases him.

This decision conflicts with Lord Justice Cotton's declaration that a man must intend to abandon his domicile of choice *permanently*. Drexel did not intend to abandon his English domicile permanently but only *completely* for a temporary period.

Next, with regard to the necessary *animus* for the acquisition of a new domicile, when the transit to its locality is complete, there is in theory no difficulty. There must be, in addition to the *animus non revertendi* to the old home, an *animus manendi* in the new. In the words of Phillimore, which have been already cited, there must be positive or presumptive proof of an intention to remain in the locality chosen for an unlimited time. It may be mentioned that the oath of a person whose domicile is in question as to his intention to change his domicile is not conclusive, but is evidence for the Court to take into consideration (l). Expressions of intention, even if clear and consistent and indefeasible *per se*, will not prevail against conduct pointing to a contrary conclusion (m). And in *Manning v. Manning* (n) the affidavit of a husband, who petitioned for a divorce, that he had settled in England with an *animus manendi*, was disbelieved. Domicile is established, "not by assertion, but by conduct" (o). Whether mere length of residence will in itself amount to such presumptive proof as is required may be doubted (p), and there

*Animus
manendi.*

(l) *Wilson v. Wilson* (1872), L. R. 2 P. & D. 435.

(m) *Munro v. Munro* (1840), 7 Cl. & F. 842, H. L.; *Crookenden v. Fuller* (1859), 29 L. J. P. & M. 1; *Doucet v. Geoghegan* (1878), 9 Ch. D. (C. A.) 441, 455.

(n) (1871), L. R. 2 P. & D. 223.

(o) *Macmullen v. Wadsworth* (1889), 14 App. Cas. 631.

(p) *Jopp v. Wood* (1865), 34 L. J. Ch. 212. Cf. *Bradford v. Young* (1884), 29 Ch. D. 617. See also *Re Grove, Vaucher v. Solicitor to Treasury* (1887), 40 Ch. D. (C. A.), 216; *Lord Advocate v. Brown's Trustees* (1907), S. C. 333, 340. In *Winans v. Att.-Gen.*, [1904] A. C. 287, and *Re Patience, Patience*

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Animus or
intention
deduced
from acts.

must always necessarily be other facts from which such an intention may be implied. It has been held that a Scotchman who resided in England for the last twenty-two years of his life, living in lodgings, hotels, and boarding-houses, had not thereby lost his Scotch nor acquired an English domicile (*q*).

The "intention" which is here spoken of is necessarily a vague expression, involving elements of law as well as fact, and much difficulty has been felt in defining it more closely. The ordinary rule that a man must be taken to intend the legal consequences of his act, fails in application when the intention itself forms the principal part of the act in dispute; and it has been argued with some force, that since a change of domicile depends upon intention alone, an expressed intention to retain a domicile of origin must be given full effect, though the intention to establish a permanent home or residence in the new locality be put beyond a doubt (*r*). It has been contended, and perhaps was at one time the law of Scotland (*s*), that in order to prove a change of domicile, it is necessary to show that the person concerned intended to change his civil status, to give up his position as a citizen of one country, and to assume a position as the citizen of another. The English law, however, may now be regarded as definitely settled on this point. The intention required for a change of domicile, as distinguished from the action embodying it, is an intention to settle in a new country as a permanent home; and if this intention exists and is sufficiently carried into effect, certain legal consequences follow from it, whether such consequences were intended or not, and even though the person concerned may have expressed a contrary wish as to the legal result of his acts (*t*). In the words of Bacon, V.-C., it is only necessary to show that a man has established himself in a country, meaning to reside there all the days of his life (*u*), or with the intention of living there permanently (*x*). Thus, where a British-born subject resided many years at Hamburg under circumstances which afforded evidence of a domicile there, and then made a will in England, where he was present for a temporary purpose, in which he declared that it was not his intention to renounce his domicile of origin as an Englishman, it was held that his declaration of intention could not prevail

v. Main (1885), 29 Ch. D. 976, it was held that a domicile was not acquired by very long residence, in spite of the absence of other evidence.

(*q*) *In re Patience, Patience v. Main* (1885), 29 Ch. D. 976.

(*r*) See *Att.-Gen. v. Waldstatt* (1864), 3 H. & C. 374; *Moorhouse v. Lord* (1863), 10 H. L. C. 272, 292; *Douglas v. Douglas* (1871), L. R. 12 Eq. 617.

(*s*) *Donaldson v. McClure*, 20 C. of Sess. Cas. (2nd Series) 307.

(*t*) *Douglas v. Douglas* (1871), L. R. 12 Eq. 617, 644; *Haldane v. Eckford* (1869), L. R. 8 Eq. 631.

(*u*) *Stevenson v. Masson* (1873), L. R. 17 Eq. 78.

(*x*) *Bradford v. Young* (1884), 29 Ch. D. 617.

against the foreign domicile in fact (*y*). It was said by the Court in that case that such an expression of intention amounted to a desire to have two domicils; or, at any rate, to change his domicile in fact without submitting to the consequences in law. A declaration of intention to retain domicile itself being thus insufficient, it is quite clear that a declared intention to retain the *nationality* of origin will have even less effect (*z*). The latter declaration, indeed, seems by itself to be hardly evidence of that intention to keep or transfer the permanent home which the law looks for; while an expressed intention to retain domicile itself is undoubtedly some evidence to show that domicile has been retained, though it will not be allowed to counterbalance actual facts. So in *Moffett v. Moffett* (*a*) the facts were held to outweigh declarations of intention. The deceased William Moffett, whose domicile of origin was Irish, went to South Africa in 1859 and resided there till his death in 1898, marrying there twice, and making a joint will with his second wife in form in use in Cape Colony. By his first wife he had a son born before wedlock, but legitimated by subsequent marriage by the law of Cape Colony. There was evidence that the deceased had repeatedly declared his intention to return to Ireland, if and when he succeeded to some Irish property at his brother's death. "All those declarations of intention," said Powell, J., "might possibly be evidence of an intention to resume his domicile of origin if in fact he returned to this country; but in my opinion, they are not sufficient to outweigh the natural results of his acts, and I think that, looking at his acts as a jury ought to do, I can come to no other conclusion than that his domicile was South Africa." So in *Gran v. Gran* (*b*), the facts were held to outweigh the declaration of intention. Here the respondent husband, a Norwegian subject, entered the British Air Force during the war, married an Englishwoman and established a home in England. By his writ on petition he alleged that he was domiciled in Norway. Lord Birkenhead, L.C., found (1) that he did reside in England, and (2) that he resided in England with the intention of remaining in England for an indefinite time.

In some cases (*c*) it has been held, no doubt, that an original domicile has been retained by the mere expression of an intention to return before death to the residence which has been aban-

(*y*) *Re Steer* (1858), 28 L. J. Ex. 22; 3 H. & N. 594.

(*z*) *Brunel v. Brunel* (1871), L. R. 12 Eq. 298.

(*a*) [1920] 1 I. R. 57.

(*b*) *The Times*, 29th April, 1921; see also *James v. Barry*, *ibid*.

(*c*) *Jopp v. Wood* (1865), 34 L. J. Ch. 212; *Re Capdevielle* (1864), 33 L. J. Ex. 306.

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Distinctive
marks of
permanent
residence or
domicil.

doned; but the distinction to be drawn between the principle of these cases and that which was followed in *Re Steer* appears to be, that while a man is not allowed to contradict the legitimate inference from his conduct by the expression of a bare wish to retain a domicile which he has practically abandoned, yet a *bonâ fide* declaration that he means in fact to return to his original residence, will be accepted by the law as evidence that the abandonment has not been complete.

The intention required for a change of domicile, therefore, is that of settling in a new country as a permanent home (*d*); but then comes the material question, what is a permanent home, and how is it to be distinguished from a temporary one? The modern decisions establish that where a foreign residence has been permanently adopted with a view to the acquisition of a fortune, a change of domicile will not be averted by the mere existence of an ulterior design to return when that object is attained (*e*); but the contrary was held by Lord Romilly in 1865 (*f*), though it is to be noted that in the last-mentioned case there was a direct expression of an intention to return to the original place of residence. A like declaration of intention was disregarded in *Doucet v. Geoghegan* (*g*), where James, L.J., said that a man who says he will go back when his fortune is made "is like a man who expects to reach the horizon." The prospect of return to their home which is cherished by political refugees is of a more determinate character, and this, so long as the exile is involuntary (*h*), will prevent the substitution of a new domicile for that of origin from being complete (*i*). If a refugee distinctly chooses to adopt the foreign country as his home, he may probably acquire a domicile there (*k*); and should he elect to remain there permanently after restoration to his own country has become possible, he may obviously thus acquire the new domicile. Similarly, when an Indian sovereign prince came to England when he was ten years old, under a treaty then made for him by which his sovereignty was ceded to England, and resided in England for nearly forty years, it was held that he retained his original domicile—the inference of fact being drawn that so soon

(*d*) *Douglas v. Douglas* (1871), L. R. 12 Eq. 212; *Udny v. Udny* (1869), L. R. 1 H. L. Sc. 441.

(*e*) *Allardice v. Onslow* (1864), 33 L. J. Ch. 434; *Bruce v. Bruce* (1790), 2 B. & P. 229, n; cf. *Goulder v. Goulder*, [1892] P. 240.

(*f*) *Jopp v. Wood* (1865), 34 L. J. Ch. 212. As to these cases of Anglo-Indian domicile, see per Lindley, L.J., in *Ex parte Cunningham, Re Mitchell* (1884), 13 Q. B. D. at p. 425; and also per Malins, V.-C., in *Doucet v. Geoghegan* (1878), 9 Ch. D. at pp. 452, 453. See chap. xii. *infra*.

(*g*) (1878), 9 Ch. D. 441. Cf. *In re Bell*, *Bell v. Kendall* (1888), W. N. 48; *Moffett v. Moffett*, [1920] 1 I. R. 57.

(*h*) *Collier v. Rivaz* (1841), 2 Curt. 858.

(*i*) *De Bonneval v. De Bonneval* (1838), 1 Curt. 856.

(*k*) Cf. *Heath v. Samson* (1851), 14 Beav. 441.

as he had a will of his own he always intended to return to India and assume his old position if and as soon as he could (l).

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Liability to
interruption.

The same principle that an involuntary detention is destitute of the requisite *animus*, is applicable to incarceration in prison (m). When the residence is liable to be interrupted at any moment by the intervention of another will, the elements of domicile are incomplete; the *animus* being at most conditional. Thus a person in military or naval service does not acquire a domicile in the place where he is stationed, but his domicile is in the territory of his own Sovereign (n); nor could an officer in the East India Company's employment, who was at all times liable to be recalled to India, acquire one in England (o). If a British subject enters the service of a foreign power, or if an alien enters the service of the British Crown, generally speaking they each acquire a domicile in the new State; and if that State comprises different territories, the domicile is acquired in that part where the residence is taken up (p). But the duty of a peer of Great Britain to advise Her Majesty whenever she may call for his advice, or to attend the House of Lords whenever his attendance there is required, whether in any sense a legal duty or not, does not incapacitate him from abandoning his English domicile of origin and acquiring a new domicile abroad (q).

In all cases it must be remembered that the onus of proof is upon the party who alleges a change of domicile (r); but it has been held that slighter evidence is required of an intention to revert to a domicile of origin, than of an intention to adopt one entirely new (s).

Onus of
proof.

In certain cases, however, the law fixes the domicile of an individual without reference to intention, or the presence of its usual *indicia*; though it would be perhaps more correct to say that, in certain cases, the law does not allow the presumption of intention, which it raises for itself, to be contradicted. The most common example of this principle is the rule that a woman

Presump-
tions of law.

Married
women.

(l) *In re Duleep Singh* (1890), 7 Mor. Bk. Rep. 228.

(m) *Burton v. Fisher* (1828), 1 Milw. 183.

(n) *Re Steer* (1858), 28 L. J. Ex. 22, 25; *Hodgson v. Beauchesne* (1858), 12 Moo. P. C. 285. See per Lindley, L.J., in *Ex parte Cunningham, Re Mitchell* (1884), 13 Q. B. D. at p. 425, as to the anomalous and exceptional nature of cases involving an Anglo-Indian domicile, and chap. xii. *infra*.

(o) *Attorney-General v. Pottinger* (1861), 30 L. J. Ex. 284; *Craigie v. Lewin* (1843), 3 Curt. 435.

(p) *Ex parte Cunningham, Re Mitchell* (1884), 13 Q. B. D. (C. A.), 418. Cf. *President of U.S.A. v. Drummond* (1864), 33 Beav. 449; *Urquhart v. Butterfield* (1887), 37 Ch. D. (C. A.), 357, 382.

(q) *Hamilton v. Dallas* (1875), L. R. 1 Ch. D. 257.

(r) *Bell v. Kennedy* (1868), L. R. 1 H. L., Sc. 307; *The Lauderdale Peerage* (1885), 10 App. Cas. 692.

(s) *Lord v. Colvin* (1859), 28 L. J. Ch. 361.

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Domicil of
married
women—
when dis-
tinct.

assumes on her marriage the domicile of her husband (t). And this is so, even though the marriage be voidable, since “a woman when she marries a man, not only by construction of law, but absolutely as a matter of fact, does acquire the domicile of her husband if she lives with him in the country of the domicile. The petitioner had the intention of taking up her permanent abode with him, and of making his country her permanent home” (u). How far she may afterwards be able to choose a new domicile for herself, and under what circumstances such a choice will be recognised, is not altogether clear.

According to the dicta of Lord Cranworth in *Dolphin v. Robins* (x), founded on the older decision of *Williams v. Dormer* (y), and adopted with approval by Sir R. Phillimore in the later case of *Le Sueur v. Le Sueur* (z), a married woman is undoubtedly rendered capable of acquiring a domicile distinct from her husband's by a judicial separation. In *Dolphin v. Robins*, Lord Cranworth evinced an inclination to go a step further. “I should add,” he says, “that there may be exceptional cases, to which even without judicial separation the general rule would not apply, as, for instance, where the husband has abjured the realm, has deserted his wife, and established himself permanently in a foreign country, or has committed felony and been transported. It may be that in these and similar instances the nature of the case may be considered to give rise to necessary exceptions.” A similar conclusion is indicated by expressions which fell from Lord Eldon and Lord Redesdale in *Tovey v. Lindsay* (a), and was adopted, as far as wilful desertion by the husband is concerned, by Sir R. Phillimore in the case of *Le Sueur v. Le Sueur* (b), where he said: “Upon the whole, I am disposed to assume in favour of the petitioner the correctness of the opinion that desertion on the part of the husband may entitle the wife, without a decree of judicial separation, to choose a new domicile for herself; and in coming to that conclusion I am aware that I am going a step further than judicial decisions have yet gone.” The petition in that case was dismissed upon another ground, namely, that though the wife, under such circumstances, might elect a domicile of her own, she could not make

(t) *Bremer v. Freeman* (1857), 10 Moo. P. C. 306; *Re Daly's Settlement* (1858), 25 Beav. 456; *Harvey v. Farnie* (1882), 8 A. C. 43.

(u) *Turner v. Thompson* (1889), 13 P. D. 37, 41. Cf. *In re Mackenzie*, *Mackenzie v. Edwards-Moss*, [1911] 1 Ch. 578.

(x) (1859), 7 H. L. C. 390.

(y) (1852), 2 Rob. Eccl. 505 (where a wife was held to have the power to change her domicile after divorce *a mensa et thoro*).

(z) (1876), L. R. 1 P. D. 139. In *Re Daly's Settlement* (1858), 25 Beav. 456, Lord Romilly had held that a separation *de facto* for thirty years was not sufficient to confer an independent domicile on a married woman.

(a) (1813), 1 Dow, 117, 138, 140.

(b) (1876), L. R. 1 P. D. 139.

her husband amenable to the *lex fori* of her new domicile, and that inasmuch as neither his domicile nor the place where the marriage was contracted was in England, the English Court had no jurisdiction to dissolve the marriage. It is hardly necessary to observe that a widow resumes on her husband's death the power of electing and changing her domicile as if she was a *feme sole*.

But in *Lord Advocate v. Taffrey* (c), the *dicta* of Lord Cranworth in *Dolphin v. Robins* were shown to be inconsistent and his *dictum* that misconduct without a judicial separation would entitle the wife to acquire a separate domicile, *e.g.* in case of desertion, was not concurred in by Lords Kingdown and Campbell; and the *dictum* of Phillimore in *Le Sueur v. Le Sueur* was disapproved. Since *Le Mesurier v. Le Mesurier*, said Lord Haldane, it has been clear that nothing short of a full juridical domicile within its jurisdiction can justify a British Court in pronouncing a decree of divorce, and that the old notion is now obsolete that there can be, short of such a full domicile, a so-called "matrimonial domicile," which can give the same result. There can be only one real domicile. Not only is there no authority for the proposition that husband and wife can have, while they continue married, distinct domiciles, but if it were otherwise the consequences in such circumstances would be extraordinary.

Further, the question whether even a judicial decree of separation would permit the wife to acquire a separate domicile was declared by the House to be still open. Thus, Foote's statement that a married woman is undoubtedly capable of acquiring a domicile distinct from her husband by a judicial separation cannot be accepted.

There is no doubt that a wife does not become capable of acquiring an independent domicile by simply entertaining a *bonâ fide* belief in her husband's death (d), or by a mere agreement for separation (e), or through his misconduct (f).

There would appear to be less doubt about the proposition that a married woman, when deserted by her husband, retains the matrimonial domicile although the absconding husband acquires a fresh one elsewhere. For purposes of jurisdiction in divorce this view is adopted by the English Courts (g); and in America the same rule has been applied to rights of property (h).

(c) [1921] 1 A. C. 146, but see *Re Grimthorpe's Settlement*, [1918] W. N. 16.

(d) *Re Cooke's Trusts* (1887), 56 L. J. Ch. 637.

(e) *Warrender v. Warrender* (1835), 2 Cl. & F. 488, 528, H. L.

(f) *Yelverton v. Yelverton* (1859), 1 Sw. & Tr. 574.

(g) *Armytage v. Armytage*, [1898] P. 178, 185, per Barnes, J. Cf. *Pitt v. Pitt* (1864), 4 Macq. 627, 640, H. L.

(h) *Bonati v. Welsh* (1861), 24 N. Y. C. A. 157; cited by Lindley, M.R., in *De Nichols v. Curlier*, [1898] 2 Ch. 60, 65.

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Such practice, however, does not necessarily depend on the ground that the wife can acquire an independent domicile, but on the ground that the husband will not be entitled to rely on his new domicile. In a recent case of much importance (*Ogden v. Ogden*) (*i*), it was suggested that if the country of the husband's domicile refuses to recognise a marriage, and so will not entertain a divorce petition against him, a wife who has been left in the country of her original domicile where the marriage took place and where it is recognised as valid, may be regarded as having a domicile in her own country for the purpose of supporting a suit.

Residence
necessary by
office.

Following the principle which decides the place of a man's domicile by that of his home—for which phrase, indeed, the word may almost be regarded as the legal equivalent (*k*)—it is established that a foreign domicile is conferred by the acceptance of any office which necessarily requires foreign residence (*l*), even although it may also involve occasional employment in other parts of the world, as in the case of one who enters the military or naval service of a Government. This rule requires some modification when applied to the case of such a sovereign Power as Great Britain, which includes within its jurisdiction several countries, each able to confer an independent domicile of its own. A Scotchman or Irishman entering the British army or navy does not thereby acquire an English domicile (*m*), since the British army and navy are Scotch and Irish as well as English. And this rule applies, whether the domicile at the time of entering the imperial service was original or acquired (*n*). It follows, that there is no presumption that an officer in the English army has an English domicile, as distinguished from a domicile in Scotland, Ireland, or the Channel Islands (*o*). It is hardly necessary to observe, that unless the residence required by the office is of a constant character, it will not be residence at all in the eye of the law, and no change of domicile will be effected by the acceptance of its duties. An apparent exception to the rule itself is the case of consular office, which arises from the general view taken by

(i) [1908] P. 46, C. A., at p. 82. Cf. the more recent cases, *Stathatos v. Stathatos* (1913), 29 T. L. R. 54; and *De Montaigne v. De Montaigne*, [1913] P. 154; and see also *infra*, pp. 147 *seq.*

(k) "A man may in fact be homeless, but he cannot be without a domicile. Subject to this distinction, the term 'home' in its ordinary popular sense is practically identical with the legal idea of domicile." *In re Craignish*, [1892] 3 Ch. 180, per Chitty, J., "Domicile means 'permanent home'; and if that is not understood by itself, no illustration will help to make it intelligible" (per Lord Cranworth, C., in *Whicker v. Hume* (1858), 28 L. J. Ch. 400).

(l) *Munro v. Douglas* (1820), 5 Madd. 379; *Att.-Gen. v. Pottinger* (1861), 30 L. J. Ex. 284.

(m) *Brown v. Smith* (1852), 21 L. J. Ch. 356; *Dalhousie v. McDouall* (1840), 7 Cl. & F. 817.

(n) *In re Macreight, Paxton v. Macreight* (1885), 30 Ch. D. 165, where the domicile was a Jersey domicile.

(o) *Ex parte Cunningham, In re Mitchell* (1884), 13 Q. B. D. 418.

international law of the relation between a consul and the State which he represents. A British subject who goes abroad as consul for his country does not acquire a foreign domicile by so doing, nor does the acceptance of a British consulate by one already domiciled abroad confer a British domicile upon the holder (p). On the contrary, a foreigner who comes to England as consul for the country in which he is domiciled retains his own domicile *ex officio*, however long his residence in this country, the rule of international law on this point appearing not to admit of contradiction (q). The older cases on this subject (r) are to the same effect, and the same rule applies *a fortiori* to ambassadors (s).

In addition to these presumptions of law which do not admit of contradiction, there are other facts which are accepted as evidence, more or less conclusive, where a difficulty arises in deciding where residence has been fixed. It is a principle of common sense that the place which a man has selected as the home for his wife and family should be regarded, in the absence of evidence to the contrary, as that in which he himself must be considered to reside (t). And this, in the case cited, was held to be so, even though the choice of residence was made expressly at the wife's request, and the house taken and furnished at her expense. It is always material, as was said in the Privy Council in the case cited (u), in determining what is a man's domicile, to consider where his wife and children live and have their permanent place of residence, and where his establishment is kept up. That is the place to which it is to be presumed that the man would go unless incapacitated from doing so by business or public duties. So where a domiciled Englishman acquired a new domicile in Ceylon, but after marriage returned to England, took rooms for his wife and children, and left them there, intending to rejoin them ultimately on leave or retirement, it was held that his original English domicile reverted (x).

Next to this test or criterion, but subordinate to it (y), comes the rule which was laid down in *Somerville v. Somerville* by Lord

(p) *Sharpe v. Crispin* (1869), L. R. 1 P. & M. 611.

(q) *Niboyet v. Niboyet* (1878), L. R. 3 P. D. 52; reversed 4 P. D. 1, but not on this point. Cf. *Udny v. Udny* (1869), L. R. 1 Sc. App. 441; *The Indian Chief* (1801), 3 C. Rob. 12, 22.

(r) *Maltass v. Maltass* (1844), 1 Rob. Eccl. 79; *Heath v. Samson* (1851), 14 Beav. 441.

(s) Cf. Story, s. 48; Phillimore, Commentaries upon International Law, 3rd ed., vol. iv., ss. 171-178.

(t) *Aitchison v. Dixon* (1870), L. R. 10 Eq. 569.

(u) *Platt v. Att.-Gen. of New South Wales* (1878), 38 L. T. 74. See to the same effect, *D'Etchegoyen v. D'Etchegoyen* (1888), 13 P. D. 132.

(x) *Hurley v. Hurley* (2) (1891), 67 L. T. Rep. 384.

(y) *Forbes v. Forbes* (1854), Kay, 341.

Indicia of domicile.

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Alvanley (z). In the case of a nobleman or country gentleman, who has two homes in different jurisdictions, as, for example, in the case of a Scotch landowner with a house in Belgravia, who lives half the year in each, the situation of the country house will be preferred to that of the town residence; while, on the other hand, a merchant, whose business lies in the metropolis, shall be considered as having his domicile there, and not in the country (a). The mere fact that a man marries a native of the country to which he has transferred his residence is *some* evidence that that residence is intended to be permanent, and therefore that a change of domicile has been made (b). So it has been held evidence of a change of domicile, more or less cogent when combined with other material facts, that a man should set up a permanent commercial business in a place, and so fix his *rerum ac fortunarum summam* there; that he should obtain naturalization in the new country, or take steps preliminary to doing so; that he should vote at elections there, thus exercising the functions of a resident citizen; that he should accept local office involving the necessity of taking an oath of allegiance to the territorial Sovereign; and that he should buy land in the new locality to which he has transferred himself (c). The expression of a wish or direction to be buried in either the old or the new country of residence does not seem to be a very important circumstance (d); and it would certainly appear unreasonable that a man's natural desire that his remains should rest, for example, in a family vault, which perhaps he has never visited in his life, should affect the view taken by the law of his actual domicile or civil status whilst living. The facts cited, and all similar ones, will be accepted as indicating that voluntary change of permanent residence from which the law deduces a change of domicile; but, as has been already said with reference to political exiles, the change of residence must be voluntary. Domicil cannot be founded upon compulsory residence, and there may well be cases in which even a permanent residence in a foreign country, if necessitated by the state of the health, will not operate upon the domicile (e). "It is not because a critical state

(z) (1801), Ves. Jun. 750, 789; and see the cases cited from Denisart, at p. 777.

(a) *Somerville v. Somerville* (1801), 5 Ves. 750, 778.

(b) *Drevon v. Drevon* (1864), 34 L. J. Ch. 129, 135; *Gomez v. Eames*, Prob. Div., *Times*, 9th and 10th July, 1878 (unreported).

(c) *Drevon v. Drevon* (1864), 34 L. J. Ch. 129. For other material facts indicating a change of domicile, see *Whicker v. Hume* (1858), 7 H. L. C. 124. *Doucet v. Geoghegan* (1878), 9 Ch. D. 441, is a case where several of these indications will be found in conflict.

(d) *Platt v. Att.-Gen. of New South Wales* (1878), 38 L. T. 74; *Douglas v. Douglas* (1871), L. R. 12 Eq. 617.

(e) *Hoskins v. Matthews* (1856), 8 De G. M. & G. 13, 28; *Beattie v. Johnson* (1848), 10 Cl. & F. 139.

of health may oblige a man to go, or to remain with the prospect of dying, abroad, that he can be held to have abandoned, either *animo* or *facto*, his domicile of origin" (f). The fact, however, that the preference for the foreign residence arose from climatic or valetudinarian considerations will not deprive such permanent foreign residence of its natural effect. In the one case the foreign abode is determined by necessity; in the other by choice (g). Similarly, with regard to moral pressure brought to bear on the choice of a residence. The mere proof that such pressure was exercised does not determine the question; its real effect on the state of mind of its subject must be considered (h).

The question has been raised, at what age a minor can elect to acquire a new domicile, and do so in fact, it being stated that, according to Scotch law, he can do so at fourteen (i). The point was not decided; but it is submitted as the true conclusion from the case cited, and from general principles, that it is in all cases a question of fact, and that no local law ought to affect the matter. If a youth is old enough to marry and acquire a home of his own, he is old enough to change his domicile; and a conventional law can no more limit his capacity in one case than in the other.

The variety of the incidents from which a change or retention of domicile may be inferred have now perhaps been sufficiently illustrated. The effects which domicile has in determining what law shall be applied to interpret a man's acts, or to the distribution of his property, do not properly come under the object of this chapter, and will be noticed in the ensuing portions of this treatise, as occasion arises. It may be observed, before leaving this part of the subject, that there is a growing tendency to regard the question of domicile as of greater importance than that originally attributed to it, in connexion with the kindred question of national character. Every act of legislation which renders it easier for a man to divest himself of or assume a particular nationality at pleasure, and which simplifies the formalities of such a process, makes a further step towards the time when no formality whatever will be required, and when the mere voluntary assumption by the individual of a new domicile will be

Domicil and
national
character,
approxima-
tion of.

(f) *The Lauderdale Peerage* (1885), 10 App. Cas. 692, 740.

(g) *Hoskins v. Matthews* (1856), 8 De G. M. & G. 13, 28, per Turner, L.J. Cf. also *Re James, James v. James* (1908), 98 L. T. 438 (where a domicile was not acquired).

(h) *Briggs v. Briggs* (1880), 5 P. D. 163; *Pitt v. Pitt* (1864), 4 Macq. 627, H. L., where the aim was to avoid creditors, and the domicile was not changed; *Re Martin, Loustalan v. Loustalan*, [1900] P. 211, C. A., where a Frenchman, having taken up his residence in England with a view to avoid a prosecution in his own country, was held by Rigby and Vaughan Williams, L.J.J., to have acquired, and by Lindley, M.R., and Jeune, P., not to have acquired, an English domicile.

(i) *Urquhart v. Butterfield* (1887), 37 Ch. D. 357.

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accepted by the Government whose protection he has left, no less than by that to which he has declared his intention of adhering, as equivalent to enrolment among the members of the community of which he has become a member, for all intents and purposes. In the United States, in particular, this view has long been gaining ground (*k*), as would naturally be expected in a country whose population is so constantly being increased by immigration from older nations; but the principle has never received any recognition in English law, although special provision has been made by the convention between her Majesty and the American Government of 1871, and the Naturalization (Amendment) Act (35 & 36 Vict. c. 39), referred to in the preceding chapter, for the renunciation of British nationality in favour of that of the United States.

Domicil for
testamentary
purposes.

As to domicil for testamentary purposes, or with relation to succession to personal property on intestacy, the law has been considerably modified by 24 & 25 Vict. c. 121 entitled, "An Act to amend the Law in relation to the Wills and Domicil of British subjects dying whilst resident abroad, and of foreign subjects dying while resident in her Majesty's Dominions." By this Act it is provided that, subject to future conventions to be made with foreign States in relation to its provisions, British subjects dying in a foreign country shall be deemed for all purposes of testate or intestate succession as to movables to retain the domicil they possessed at the time of going to reside in such foreign country; unless they have resided in such foreign country for a year at least, and shall have made a formal and public written declaration of an intention to become domiciled there (s. 1). Similarly foreigners dying in Great Britain shall not be deemed to have acquired a domicil here unless they have resided within her Majesty's dominions for the same period previous to their death, and have made a similar declaration of intention (s. 2). It is to be observed that the Act takes no effect of itself, but simply empowers her Majesty to call its provisions into effect by Order in Council, after a convention has been made with the particular foreign State concerned for that purpose (*l*).

Statutory
domicil,
objections
to.

It is perhaps doubtful how far it is wise to call into existence a statutory kind of domicil for a particular purpose, or to deny that that is domicil which international law recognises as such.

(*k*) See Wheaton, Int. Law (1904), pp. 238 *seq.*; Story, Conflict of Laws, § 49 b; and cf. *ante*, p. 49.

(*l*) No convention has been made under this statute, strictly speaking (see Chitty's Statutes, vi. 944); but a convention on analogous principles, with reference to succession and legacy duties, has been made with Switzerland (as to the canton of Vaud). The text will be found in the *London Gazette*, 25th October, 1872. See further on succession by will, *infra*, chap. vi. sec. iv.

In *Hamilton v. Dallas* (*m*) it was contended that where a foreign State, such as France, has prescribed certain conditions for the acquisition of domicile within its territories by foreigners, no domicile can be acquired for purposes of succession or testamentary disposition in that country unless those conditions are complied with. The Code Napoléon (Art. 13) gives the right of acquiring a domicile and other civil rights in France only to those foreigners who shall have obtained the authorisation of the Government, and cases (*n*) were cited from the French reports to show that a domicile *de facto* without such authorisation was not regarded as sufficient to confer any of the ordinary results of a domicile recognised by the law. It was, however, held by Bacon, V.-C., that whether or not the 13th article of the Code was intended to prevent the acquisition of a domicile in France for the purposes of succession, which was not the opinion of the learned judge, "the fact that a foreigner can acquire a domicile *de facto* in France is not for a moment to be called in question. It requires no provision in the Code for that; it is a law paramount to the law of the Code, not provided against nor provided for in the Code, but a natural and national right against which there is no interdiction or prohibition." There can be no doubt that this view is in accordance with the principles of international law. Statutes which attempt to cut down or enlarge the natural capacity of every adult to acquire a domicile by the requisite *animus* and *factum*, do nothing in reality towards taking away or conferring domicile, strictly so called. What they really effect is an alteration in the purposes for which the test of domicile is applied by the Legislature that passes them; and to declare that something less or something more than domicile, as the case may be, shall in the courts of that Legislature decide questions which private international law refers to domicile alone. This is one of the very points of difference between nationality and domicile, to which Lord Westbury calls attention in *Udny v. Udny* (*o*). "The political status may depend upon different laws in different countries; whereas the civil status is governed universally by one single principle, namely, that of domicile, which is the criterion established by law for the purpose of determining civil status. For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy or intestacy, must depend." For *international* purposes, except where regulated by special con-

(*m*) (1875) L. R. 1 Ch. D. 257; *Bremer v. Freeman* (1857), 10 Moo. P. C. 306.

(*n*) *Melizet's Case*, Dalloz, 1869, i. 294; *Sussman's Case*, Dalloz, 1872, ii. 65; *Forgo's Case*, Cour de Cass. 4th May, 1875.

(*o*) (1869), L. R. 1 H. L., Sc. 441, 457. Cf. *Abd-ul Messih v. Farra* (1887), 13 App. Cas. 431; 57 L. J. P. C. 88.

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vention between special States, as provided by 24 & 25 Vict. c. 121, it would follow from this reasoning that municipal legislation purporting to limit or to enlarge the natural power of acquiring a domicile within the dominion of such legislation, should be disregarded. The same question decided in *Hamilton v. Dallas* (p) had already been determined by Lord Wensleydale in *Bremer v. Freeman* (q), but in that case the judgment went rather upon the intended scope and proper construction of the French law, and not so distinctly upon the paramount nature of the right. In any event, a domicile so conferred by the statutes of one particular State would clearly not be entitled to international recognition, and the inconveniences of a double domicile would at once be introduced. That a man can have but one domicile for the purposes of succession was clearly laid down by Lord Alvanley in *Somerville v. Somerville* (r), and the principle has received the fullest recognition since that decision (s).

Commercial
domicil in
time of war.

The subject of commercial domicile or *quasi-domicil*, which is peculiar to a time of war, does not properly come within the scope of the present treatise, but it may be useful to advert to it here. Popularly speaking, it is sometimes said that the character of private property on the high seas in time of war is decided by the commercial domicile of the owner. It is more correctly stated by Wheaton, that a man's property may acquire a hostile character, independently of his personal residence or nationality (t). Thus, if a man carries on trade from a hostile port, as a merchant of that port, his property engaged in enterprises which have originated from that port will be regarded as in hostile ownership (u). A man may thus have commercial concerns in two countries, and if he acts as a merchant of both, he must be liable, in a prize court, to be considered as a subject of both, with regard to the transactions originating respectively in those countries (x). Nor is it necessary, in order to make a man a merchant of any place, that he should have a counting-house or fixed establishment there; if he is there himself from time to time, and acts as a merchant of the place, it is sufficient (y); though he may of course avoid this liability upon the outbreak of war by withdrawing from and putting an end to the trade he has hitherto carried on (z).

(p) (1875), L. R. 1 Ch. D. 257.

(q) (1857), 10 Moo. P. C. 306; see also *Collier v. Rivaz* (1841), 2 Curt. 855; *Anderson v. Laneville* (1854), 9 Moo. P. C. 325. (r) (1801), 5 Ves. 756.

(s) *Crookenden v. Fuller* (1859), 29 L. J. P. & M. 1; *Munro v. Munro* (1840), 7 Cl. & F. 842; *Hodgson v. De Beauchesne* (1858), 12 Moo. P. C. 285.

(t) Wheaton (Dana), § 334.

(u) *The Indian Chief* (1800), 3 C. Rob. 12; *The Portland* (1800), 3 C. Rob. 41; *The Susa* (1798), 2 C. Rob. 255; *The Harmony* (1800), 2 C. Rob. 322.

(x) *The Jonge Klassina* (1804), 5 C. Rob. 297, 302.

(y) *Ibid.* pp. 303, 304.

(z) *The Portland* (1800), 3 C. Rob. 41; *The Indian Chief* (1800), 3 C. Rob.

It was said in *The Annaberg*, 2 B. & C. P. C. 241 (1916), that residence, which is immaterial to the conception of civil domicile, is essential for commercial domicile. "A clear distinction," said Cator, P., "is to be drawn between the enemy merchant who resides and does business in his own country, but at the same time has a house of trade in a foreign land, and his fellow-citizen, who, without intending to change his nationality or his civil domicile, settles in some foreign country and trades there in person. The latter acquires a trade domicile; the former does not. The distinction is of capital importance in prize law, for in the former case the goods of the enemy merchant even though they appertain only to his foreign house, are subject to condemnation, whereas those belonging to the enemy merchant actually residing in the same country will be restored." And in *The Hypatia*, 2 B. & C. P. C. 377 (1916), Evans, P., held that commercial domicile cannot be established without proof of a sufficient residence of the trader in the country where the business is carried on or the house of trade is situate (a). In the case of *The Turkish Moneys Taken at Mudros*, 2 B. & C. P. C. 336 (1916), it was held that moneys having a commercial purpose in enemy territory had a hostile commercial or trade domicile and were therefore subject to condemnation as enemy goods.

The French phrase, by which parties to a contract "elect domicile" for the purposes of the contract, is convenient, but not strictly accurate. Nothing in the nature of domicile arises from such an election, but the rights of the parties under the contract may be affected, and the jurisdiction of the Courts of the country of the "elected domicile" enlarged. Thus, service on an agent in England appointed for that purpose has been held good, though not in accordance with the English rules, when the French parties had by the contract "elected domicile" in England for such purposes (b).

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Elected
domicil.

12. For this subject generally, and for other cases relating thereto, see Phillipson, *Effect of War on Contracts* (1909), and Dicey, *Conflict of Laws* (1922), pp. 146, 789-99.

(a) See Pitt Cobbett's *Leading Cases on International Law*, 4th ed., by Bellot, ii. pp. 22-6.

(b) *Tharsis Sulphur Co. v. Société des Métaux* (1889), 58 L. J. Q. B. 435. See the cases cited below (chap. xi.) on the validity of judgments obtained in the Courts of "elected domicile."

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CHAPTER III.

CAPACITY; FOREIGN GUARDIANS AND CURATORS.

Capacity and
incapacity,
theories
as to.

THE question of the capacity, or rather the incapacity, of persons is one of which it is difficult to gather anything like a satisfactory view from the isolated decisions on the subject to be found in English law. All individuals, about whom nothing more is known than that they are members of a particular community, are presumed by the law to be as *capable* of regulating their own actions, entering into contracts, and disposing of their own property, as their neighbours. Infants, however, and persons of unsound mind, are regarded in every civilised country as labouring under a certain *incapacity*, for most of these purposes; and the declarations of this incapacity, which are made by the law properly claiming jurisdiction in the matter, may be regarded as stamping a certain mark upon the person for the information of other tribunals and communities. How far this mark will be regarded by them, or, in other words, how far the declarations of incapacity made by a foreign law are to be recognised as valid and binding, is a branch of international jurisprudence upon which little agreement is to be found. The conflicting opinions of the jurists may be perhaps conveniently regarded under two main heads, directly opposed to each other; the first springing from the theoretical division of all laws into *real* and *personal* (a). The writers of this school agree in considering that personal laws, or laws directed *in personam*, impress certain fixed qualities upon the person, which adhere to it wherever it is removed and must be recognised by the tribunals of all jurisdictions alike. This personal law, according to Hertius (b), is the law of that State to which the person is subject by *domicil*, and extends not only to the acts of the individual, wherever done, but to his dealings with property, real as well as personal, wherever situate. Boullenois (c), Bouhier (d), Rodenburg, and P. Voet (e) (the

(a) A distinction formulated, probably for the first time, by Bartolus, in the 14th century, who classified statutes as *real* and *personal*, according to the arrangement, obviously often accidental, of the subject and predicate in the enacting sentences.—Bart. Cod. I. 1.

(b) De Coll. Leg., § 4.

(c) Princ. Gen. pp. 4, 5, 6.

(d) Cout. ch. 23.

(e) De Stat. § 4, ch. 2.

last-named, however, distinguishing between the operation of the principle with regard to *real* and *personal* property) lay down a similar rule. As to the question how far a change from the domicile of origin may alter the qualities which have been once impressed by the proper domiciliary law, the views of the older jurists are so conflicting that there is little object in quoting from them.

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The opposing theory is that which denies to the laws which regulate the capacity and *status* of persons subject to them any extra-territorial operation whatever. Such laws are, according to this view, the mere eyes by which the Legislature sees the persons who come under its notice, and can only present one kind of image to its perception. This theory has been by no means so generally adopted as the former, and the younger Voet (f) is perhaps its best-known advocate. It is obviously capable of being modified into one more in accordance with the views of English jurisprudence, namely, that the tribunals of one State, when considering acts done within the limits of another by persons there domiciled, will refer to the laws of that other State all questions of the capacity of the persons in relation to those acts, but will not allow the foreign laws in question so to operate as to override their own regulations for persons properly their subjects.

A departure from both those theories is to be seen in the French law on the subject (Code Civil, Art. 3), which provides that all questions of *status* and domicile, in the case of French subjects, even though domiciled abroad, shall be referred to French law as the law of their *nationality*; but the view more commonly adopted on the Continent is that which regards the domiciliary law as the one properly applicable.

The views hitherto taken by English law of the question of capacity are somewhat perplexing, a state of things for which the loose and inaccurate extension of the term beyond its proper meaning is perhaps responsible. It has already been said that the word can mean nothing more in strictness than the normal and ordinary condition of all human beings. To say that a man is of full capacity is to say simply that he is of full age, and is in full possession of his faculties. Superadded to this meaning comes a purely conventional one, whose effect becomes intelligible only by observing its negations. This supplementary meaning of the word signifies that the person whose capacity is under consideration is not the subject of any of the prohibitions or deprivations of the laws which actually govern him and his actions. More accurately, that he is not affected by the depriva-

Incapacity
distinguished
from
prohibition.

(f) Ad. Pand. I. iv. 7.

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tions and prohibitions of law otherwise and more stringently than the other reasonable adults by whom he is surrounded. Where a deprivation or a prohibition is general in its effect, it imposes no incapacity upon anyone. It does, however, occasionally happen that a prohibition, which is in reality universal, is apparently particular; and that a man is prohibited from a complex act which seems at first sight to be one permissible to others. For example, A (before the Act of 1907) wished to marry B, his deceased wife's sister, but the English law prohibited him from doing so. Inasmuch as C, D, E, &c., might marry B, if they and she liked, A may be said, in a certain loose sense of the term, to have been incapacitated by English law from that act. Strictly speaking, this is incorrect. Marriage with a deceased wife's sister, the act in A's mind was *universally* prohibited by English law, and neither A nor anybody else might do it. It is true that any other man not similarly related to her might marry B, but if any other man married her, he would not be doing that prohibited act which A desired to do. A's capacity, therefore, was not in any way affected by the prohibition. It will be seen, however, that the distinction between a prohibition and an incapacity is sometimes sufficiently fine to involve a certain amount of confusion (g).

Capacity
tested by the
lex loci actus.

On the question of *capacity* in the strict sense of the term, i.e. the capacity of a sane adult to do a lawful act, the English authorities are scanty, and even discordant. According to Story (h) and others, the *law of the place where an act is done, or a contract entered into*, is the proper law to decide all questions of minority or majority, competency or incompetency, and in fact all matters of status and capacity whatever. On the question of the full age which enables a man to bind himself by a contract, Lord Eldon held the same at Nisi Prius (i). In *Ruding v. Smith* (k), which was eventually decided upon a different principle, the opposite view was strongly pressed upon Lord Stowell, who expressly guarded himself against being supposed to accept it. "I do not mean to say," he observes in his judgment, "that Huber is correct in laying down as universally true, that '*personales qualitates, alieni in certo loco jure impressas, ubique circumferri, et personam comitari*,' that a man, being of age in his own country, is of age in every other country, be the law of majority in that country what it may be" (l). And in *Simonin v. Mallac* (m), Sir Cresswell Cresswell says

(g) Cf. further on this point *infra*, chap. viii.

(h) Story, *Conf. of Laws*, § 103.

(i) *Male v. Roberts* (1800), 3 Esp. 163.

(k) (1821), 2 Hagg. Cons. 371.

(l) At p. 391.

(m) (1860), 2 Sw. & Tr. 67.

clearly, "In general the personal competency or incompetency of individuals to contract has been held to depend upon the law of the place where the contract was made."

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These authorities are at any rate sufficiently cogent to render rather startling a dictum of the Court of Appeal, in the modern case of *Sottomayor v. De Barros* (n), where it was said to be "a well-recognised principle of law," that the question of personal capacity to enter into any contract was to be decided by the law of domicile. The question in that case was simply of the validity of a marriage entered into in England between two Portuguese first cousins, prohibited, like all other first cousins, from intermarrying by the law of Portugal. According to the analysis of the word "capacity," which has been attempted above, this was not a question of capacity at all, but of the legality of an act; and it will be shown, when discussing the subject of contract (o), that the so-called marriage contract, if a contract at all in the eye of the law, is a contract of a very different nature from that between vendor and purchaser, master and servant. On the question, therefore, of the legality of a marriage prohibited by a certain law, a dictum as to the personal capacity of a man to contract was doubly superfluous, especially as it will be seen below (p) that the decision could in fact have been supported on a sound foundation of less questionable material. The view of Sir J. Hannen in the above case, in favour of the *lex loci contractus* as governing personal competency, appears to be supported by the later judgments in *Ogden v. Ogden* (q) and *Chetti v. Chetti* (r); but it is somewhat doubtful whether the observations there made as to capacity with regard to marriage were intended to apply fully to capacity in general.

Capacity
and the *lex*
domicilii.

That the legality of a marriage must be decided by the law of the domicile of the parties, was decided in the case of a marriage between a woman and her maternal uncle, both Jews, valid by the law of the place of celebration and by Jewish custom, but invalid by English law, which was the law of the domicile of the parties (s). It is possible that the same test would be applied if the marriage was forbidden, and therefore invalid by the law of one only of the contracting parties. The law of England, for example, would probably hold the marriage of a domiciled Englishwoman with an uncle to be invalid, whatever was the

Marriage.

(n) (1879), 37 L. T. 415; 5 P. D. 94.

(o) *Infra*, chap. viii.

(p) *Infra*, chap. viii.

(q) [1907] P. 107; [1908] P. (C. A.) 46 (Sir Gorell Barnes, Cozens-Hardy, and Kennedy).

(r) [1908] P. 67 (Sir Gorell Barnes).

(s) *De Wilton v. Montefiore*, [1900] 2 Ch. 481. Cf. *Sottomayor v. De Barros*, *supra*; *Brook v. Brook* (1861), 9 H. L. Cas. 193; *Ogden v. Ogden*, [1908] P. 46, C. A.

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Marriage
settlement.

domicil of the uncle : on the ground that the law of the domicil of the woman regarded such a union as incestuous. But the commoner case of a marriage with a deceased wife's sister could hardly be so regarded, in view of the sanction given by the Crown to such marriages in the Colonies ; and it will be seen hereafter that except for the purposes of inheritance to land, such marriages are referred by English law to the *lex domicilii* (t).

The question of capacity, not in reference to the contract of marriage, but to a marriage contract or settlement, has been considered in two modern cases (u). The contest in *Cooper v. Cooper* was as to the validity of a pre-nuptial contract entered into by a female minor in Ireland, which was the country of her domicil, in contemplation of her marriage with a domiciled Scotchman. It was attempted to set up the Scotch law, as the law of the place where it was intended to be performed, on the question of her capacity to make a valid contract. It need hardly be said that the Irish law which was the *lex domicilii* and also the *lex loci actus*, was preferred. There are no doubt expressions in the judgment of Lord Halsbury, C., showing a distinct tendency to lean on the *lex domicilii* whether it was the *lex loci actus* or not ; but both Lord Watson and Lord Macnaghten expressly guard themselves against being taken to have decided between the two (x). It is moreover noticeable that the passage from Story on which Lord Halsbury relied (§ 64) relates only to cases where the act is done in the country of the domicil, i.e. in cases where the conflict between the *lex domicilii* and the *lex loci* does not arise. This will be best demonstrated by examining the actual words used.

Per Lord Halsbury, p. 99 : "The capacity to contract is regulated by the law of domicil. Story has with his usual precision laid down the rule (§ 64) that if a person is under an incapacity to do any act by the law of his domicil, the act when done there will be governed by the same law wherever its validity may come into contestation in any other country." The words "when done there" are important as showing that Story was not laying down the general principle with regard to acts done elsewhere than in the country of the domicil ; and

(t) *Infra*, chap. iv.

(u) *Cooper v. Cooper* (1888), 13 App. Cas. 88 ; *Viditz v. O'Hagan*, [1900] 2 Ch. 87, C. A.

(x) Lord Watson says (p. 105) : "Whether the capacity of a minor to bind himself by personal contract ought to be determined by the law of his domicil, or by the *lex loci contractus*, has been a fertile subject of controversy. In the present case it is unnecessary to decide the point." Lord Macnaghten says (p. 108), after stating the same question : "Perhaps in this country the question is not finally settled, though the preponderance of opinion here as well as abroad seems to be in favour of the law of the domicil. It may be that all cases are not to be governed by one and the same rule."

both the examples given by Story in the same paragraph are limited in the same way (*y*). The first example indeed is limited not only to an act done in the country of the domicile, but done with regard to property situate in the country of the domicile. The second is not an example of capacity strictly speaking, but of the power of a married woman to act without the concurrence of her husband, as to which the law of the matrimonial domicile must necessarily prevail.

The subsequent passages of the same author, in which are summarised "some of those rules which seem best established in the jurisprudence of England and America," show clearly that Story, in cases where the conflict did arise, preferred the *lex loci* (*z*). And though, so far as the ultimate appellate tribunal is concerned, the conflict between the two laws was thus left open, yet Courts of first instance must necessarily be guided by the strong language used in *Sottomayor v. De Barros*, which has already been referred to. It was on this ground, without expressing a personal opinion, that Stirling, J., pronounced a decision in favour of the *lex domicilii* (*a*), after finding the facts in such a way as to raise the precise point. But, like *Cooper v. Cooper*, this was another case, not of the contract of marriage, but of a matrimonial contract. It may be that there is some affinity between these two kinds of contract (*b*) which renders the doctrine of *Sottomayor v. De Barros* peculiarly applicable to the latter case; and that this was in the mind of Lord Macnaghten when he said that possibly all cases were not to be governed by the same rule (*c*).

In *Viditz v. O'Hagan* (*d*), the Court of Appeal appear to have assumed that the capacity of a married woman to affirm or repudiate a pre-nuptial settlement entered into by her as a minor, depended upon the law of the new domicile which she acquired by

(*y*) Story, 1, c. § 64. "Thus an act done by a minor, in regard to his property, situate in the place of domicile, without the consent of his guardian, if valid by the law of the place of domicile, *where it is done*, will be recognised as valid in every other place; if invalid there, it will be held invalid in every other place. So, if a married woman, who is disabled by the law of the place of her domicile from entering into a contract or from transferring any property *therein* without the consent of her husband, should make a contract, or transfer any property situated therein, the transaction will be held invalid and a nullity in every other country."

(*z*) Story, Conf. § 101: "*Acts in the Country of the Domicil*.—First, the capacity, state, and condition of persons according to the law of their domicile will generally be regarded as to acts done . . . in the place of their domicile. . . ." *Ibid.* § 102: "*Acts in other Countries*.—Secondly, as to acts done, and rights acquired, and contracts made in other countries, touching property therein, the law of the country where the acts are done, the rights are acquired, or the contracts are made, will generally govern in respect to the capacity, state, and condition of persons."

(*a*) *In re Cooke's Trusts* (1887), 56 L. J. Ch. 637.

(*b*) Cf. *infra*, chap. viii.

(*c*) *In Cooper v. Cooper* (1888), 13 App. Cas. at p. 108.

(*d*) *Viditz v. O'Hagan*, [1900] 2 Ch. 87; 69 L. J. Ch. 507.

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the marriage; the decision in *Sottomayor v. De Barros* being cited to them for that proposition. It has already been pointed out that this was not a case of capacity to contract, but of capacity to marry. It is not unreasonable to say that the post-nuptial power of interfering with a pre-nuptial marriage settlement ought and does depend upon the law of the matrimonial domicile; but this power is not what is always, or usually, meant by the term "capacity." The construction and incidents of a marriage settlement or contract must, upon general principles, be decided according to the intention of the contracting parties, that is, by the law which the parties intended to govern it (e). And in the case of matrimonial settlements or contracts, this law is almost always that of the matrimonial domicile (f). This law was rightly adopted in *Viditz v. O'Hagan*; but it is submitted with diffidence that it would be incorrect to regard it as applied to decide the question of capacity. The foreign law (in that case Austrian) was not that a married woman, long past twenty-one years of age, and married to an Austrian resident, was of less capacity than other adults. The Austrian law under consideration was that no pre-nuptial settlement made by a woman who was then a minor, could be affirmed or ratified when the married woman afterwards attained her full capacity.

It may be added in conclusion on this point, that Lord Eldon's decision in *Male v. Roberts* has never been overruled, and that Dicey (g), after attributing capacity generally to the law of the domicile, states as an exception, that a person's capacity to bind himself by an *ordinary mercantile contract* is (probably) (?) governed by the law of the country where the contract is made (*lex loci contractus*).

The power of a married woman to contract in her own name depends of course upon the law which governs the relation created by the marriage, *i.e.* the law of the matrimonial domicile. The decision in *Guépratte v. Young* (h), which appears at first sight from the head-note to be an authority for referring capacity to contract to the law of the domicile, is not so in reality (i). In that case not only was the locality where the marriage was celebrated, and where the husband had his domicile, French; but the husband and wife had before marriage, by the nuptial contract itself, adopted the provisions of the Code Civil as the basis of their

(e) *Infra*, chap. viii.

(f) *Infra*, chap. viii. *Lansdowne v. Lansdowne* (1820), 2 Bligh, 60. In *Van Grutten v. Digby* (1862), 32 L. J. Ch. 179, the contract and intention of the parties was manifestly to adopt English law and not the law of the matrimonial domicile, and the judgment proceeds on that express ground!

(g) *Conflict of Laws* (1922), pp. 580, 582.

(h) (1851), 4 De G. & S. 217.

(i) Dicey, however, declares that the woman's contractual capacity was governed by the law of her domicile; *Conflict of Laws* (1922), p. 580.

matrimonial rights (*pour base de leur association conjugale*), with elaborate provisions as to the allotment of the dotal property. The question was not, therefore, whether Madame Guépratte had *capacity* to contract in England, in the proper sense of the word, but whether the nuptial contract, which defined the effect to be given to the marriage upon the property of the contracting parties, allowed or authorised her to do so. Marriage itself is not a contract in the ordinary sense of the term, but there is in every marriage such an implied contract, providing for the future rights of the parties in each other's goods. Here the ordinary implied contract was formulated in writing, and expressly adopted the Code Civil as its controlling law. The law of France was therefore the proper one to determine, not the *capacity* of the wife to contract in England, but her *right* to contract at all (*k*).

Next, with regard to questions of pure capacity or incapacity, where there is no act or contract to the law of the place of which the matter can be referred, it appears clear that the law of the domicile of the person should prevail. In such a case there is no law to compete with it but the law of the *forum*, which cannot justly claim to decide anything beyond matters of procedure and remedy. Accordingly, in the case of *Re Hellmann's Will* (1), where a testator, domiciled in England, had devised legacies to children domiciled and resident in Hamburg, the Master of the Rolls held, on the application of the executors, that the age at which the children were to be considered as having attained their majority was to be decided by the law of Hamburg, but refused to recognise the authority which that law gives to the father to receive such legacies as guardian for his infant children. The domicile of the testator being English, and the funds being also in England, the Court was of course justified, from one point of view, in refusing to pay the money over, except in the manner contemplated by English law, which governed the will. Nevertheless, it appears at first sight a little inconsistent to have accepted the limit at which natural incapacity ceased as determined by the law of the domicile of the legatees, but to have refused to recognise the powers of guardianship conferred by the same law on the father as a modification of the incapacity which it prolonged. It is by no means clear that the decision would be followed on this point at the present day; and it is certainly at variance with the cases as to foreign *curators* of lunatics, which

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Capacity
apart from
acts or con-
tracts.

Capacity for
purposes of
succession.

(*k*) In a later case, *Re Bankes, Reynolds v. Ellis*, [1902] 2 Ch. 333, the capacity of a lady domiciled in England to bind herself by a marriage settlement was decided by English law; but no reference was made to the question as to whether the settlement, in the event of its being forbidden by the law of Italy, which was the husband's country, was void as a contract for which both parties were incompetent.

(1) (1866), L. R. 2 Eq. 363.

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are cited *infra*. The decision in *Re Hellmann's Will*, so far as the status of infancy is concerned, is quite in accordance with the leading case of *Dogliani v. Crispin* (m). There, the decision of a Portuguese Court that an Englishman domiciled in Portugal was a *pion*, or plebeian, and not of noble rank, and that his illegitimate son was therefore entitled by Portuguese law to succeed to his personal property *ab intestato*, was accepted and acted upon by the judge of the English Court of Probate, whose decision was confirmed by the House of Lords. It is to be observed, however, that in that case the Portuguese law, being the law of the intestate's domicile, was strictly entitled to regulate all the questions connected with the succession to his movable property, the *quasi*-capacity or status of the intestate being only one of them. On the mere question of capacity or incapacity, unconnected with any act or contract done in England, some additional authority in favour of accepting the decision of the law of the domicile may be gathered from the judgment of Lord Campbell in *Stuart v. Bute* (n), speaking with reference to the Scotch law of majority.

Representatives of incapacitated persons.

Closely connected with the question of the capacity of the person comes that of the powers and rights of those who are appointed by his domiciliary law as the representatives and guardians of his interests. The status of guardian not being a status recognised by the law of this country, unless constituted here, it is not a matter of course to appoint a foreign guardian to be English guardian, but that is only a matter to be taken into consideration (o). This may be regarded as a natural consequence of the proposition that the *lex loci* prevails as to questions of capacity when any act done beyond the jurisdiction of the domiciliary law is in question, since the persons claiming those rights and powers before an English Court can only do so with the view of exercising them in England. Accordingly, it was decided in *Johnstone v. Beattie* (p) that foreign tutors and curators have no right or authority in this country, and that the Court of Chancery has jurisdiction to appoint an English guardian of an infant whose presence in England was transient only, and whose domicile and real property were Scotch. Lord Cottenham, in his judgment in that case, called attention to the fact that the Court of Chancery, if it recognised foreign tutors as guardians in England, might in effect have to administer foreign laws (p. 113), and denied that any argument in favour of such a practice was to

Recognition of foreign guardians or curators.

(m) (1866), L. R. 1 H. L. 301.

(n) (1861), 9 H. L. C. 467; see also per Lord Westbury in *Udny v. Udny* (1869), L. R. 1 H. L., Sc. 457.

(o) Per Lord Campbell in *Stuart v. Bute* (1861), 9 H. L. C. 440, 464; citing *Johnstone v. Beattie*, *infra*.

(p) (1843), 10 Cl. & F. 42.

be drawn from the fact of the *patria potestas* being recognised in the case of foreign children by the English Courts.

“This illustration” [he continues] “proves directly the reverse; for although it is true that the parental authority over such a child is recognised, the authority so recognised is only that which exists by the law of England. If, by the law of the country to which the parties belonged (*q*), the authority of the father was much more extensive and arbitrary than it is in this country, is it to be supposed that the father would be permitted here to transgress the power which the law of this country allows? If not, then the law of this country regulates the authority of the parent of a foreign child *living* (*r*) in England, by the laws of England, and not by the laws of the country to which the child belongs.”

How much the judgment of the House of Lords in *Johnstone v. Beattie* must be taken to have been decided, is well explained by Lord Cranworth in the case of *Stuart v. Bute* (*s*): “Perhaps it might have been a decision more consonant to the principles of general law to have held in *Johnstone v. Beattie* that every country would recognise the status of guardian in the same way as it undoubtedly would the status of parent, or of husband and wife (*t*). But . . . all that was decided there was, that the status of guardian not being recognised by the law of this country unless constituted in this country, it was not a matter of course to appoint a foreign guardian to be English guardian, but that that was only a matter to be taken into consideration. That was all that was decided in that case.” The principle, however, that the foreign guardian cannot *claim* recognition, appears to be well established. Nevertheless, where there is a duly constituted foreign guardian already appointed, the Court will reserve to him the exclusive custody and control of the infant, and even allow him, on a proper application, to remove it from the jurisdiction, though the order for the appointment of an English guardian will not be discharged (*u*). But if the infant be a British subject, it seems that an order will not be made to remove it from the jurisdiction against its will (*x*). Whether personal property, *e.g.* a legacy, will be ordered to be paid to the foreign guardian of an infant seems on the cases a little doubtful (*y*), but it would

(*q*) *Semble*, by domicil.

(*r*) The facts of the particular case show that this word was not here used as equivalent to *domiciled*.

(*s*) (1861), 9 H. L. C. 440.

(*t*) See *infra*, chap. iv.

(*u*) *Nugent v. Vetzera* (1866), 2 Eq. 704.

(*x*) *Dawson v. Jay* (1854), 3 De G. M. & G. 564; explained in *Stuart v. Bute* (1861), 9 H. L. C. 467.

(*y*) *Re Crichton's Trusts* (1855), 24 L. T. Rep. 267; *Re Browne*, [1894] 3 Ch. 412, C. A.; *Ferguson's Trusts*, 22 W. R. 762; *Re Hellmann* (1866), 2 Eq. 363.

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appear clear on principle that this question should depend upon the law of the infant's domicile. It has been held that a Scotch *curator bonis* of an infant of Scotch domicile was not bound to pay into court assets belonging to the infant, receivable under an English will of which the *curator* was administrator, and which was in course of administration by the Court (z).

The jurisdiction of the Chancery Division of the High Court over infants depends upon their becoming "wards of Court." This is effected either by an order made on petition for the appointment of a guardian, or by an action being properly commenced in an infant's name with respect either to his person or his property (a). And there seems no doubt that the Court will assume this jurisdiction in all cases where the infant is actually, though transiently, present within the jurisdiction, though the mere fact that the infant is interested in property within the jurisdiction is insufficient, if the infant be alien or non-resident (b).

Apart from presence or domicile, it is established law, and has been laid down in a modern case by the Court of Appeal, that the English Court has jurisdiction to appoint guardians of any infant who is a British subject, wherever that infant may be residing, and whoever may have the custody of that infant abroad (c). In the judgment cited, the above proposition is qualified by the words "in a proper case," but this can only mean that the jurisdiction, which exists in all cases, is to be exercised with propriety and discretion. But where the evidence as to the nationality of children born and living in France was conflicting, the Court of Appeal refused to interfere with a guardian already appointed by the French law (d), on the ground that, whatever the effect of the certificate of naturalisation in dispute, it was not desirable under the circumstances to appoint a guardian in England. And in a recent case, where the infant was living with its mother (one of its guardians by the father's will) in Jersey, the Court in England made an order directing in what religious faith it ought to be educated. The nationality of the infant, who was made a ward of Court as being interested in English realty, was not expressly referred to, but must have been the foundation of the jurisdiction (e).

(z) *Mackie v. Darling* (1871), L. R. 12 Eq. 319. See the analogous cases as to the title of the *curator* of foreign lunatic, cited *infra*, pp. 112 *seq.*

(a) *Stuart v. Bute* (1861), 9 H. L. C. 440; *Gynn v. Gilbard* (1860), 1 Dr. & Sm. 356. Even when no order is made on the application for a guardian, it seems that the infant may be constituted a ward of Court by arrangement: *De Pereda v. Mancha* (1881), 19 Ch. D. 451.

(b) *Brown v. Collins* (1883), 25 Ch. D. 56. Cf. *De Pereda v. Mancha*, *supra*.

(c) *In re Willoughby* (1885), 30 Ch. D. 324, 332; *Hope v. Hope* (1857), 4 De G. M. & G. 328, 345. (d) *In re Bourgeoise* (1889), 41 Ch. D. 310.

(e) *In re Montagu, Montagu v. Festing* (1884), 28 Ch. D. 82. Cf. *Brown v. Collins* (1883), 25 Ch. D. 56.

Jurisdiction
over infants
—present
within the
jurisdiction.

Nationality
—effect of.

When an appointment of guardian is made in the case of an infant resident abroad, on the ground of nationality, it is usual for the Court to join with persons resident out of the jurisdiction someone within it, in order that there may be someone answerable to the Court (*f*). But there are cases in which guardians appointed in Ireland and there resident have been appointed guardians here (*g*).

It appears uncertain whether, by French law, a person of full age who has been adjudged a *prodigue*, and placed under the control of a *conseil judiciaire*, has suffered any alteration in his status or not. In any case, it has been held more than once that disabilities and disqualifications of this penal character, created by a foreign Court, will not be recognised here; and a man of full age entitled to a fund in Court in England, has a right to demand payment to him on his own receipt, notwithstanding such an adjudication, and the opposition of the *conseil judiciaire* (*h*).

The jurisdiction in lunacy is independent of the questions of domicile or nationality, and arises from the mere presence or temporary residence within the dominions of the Crown of the person whose lunacy is asserted. Thus, the Court in lunacy has jurisdiction to order an inquiry into the state of mind of a foreigner, domiciled abroad, but temporarily resident in England; and as a necessary consequence of such inquiry, to undertake the care of the person and property in England of the alleged lunatic (*i*). But both the domicile of the person and the transient nature of his presence here may be material to the question of discretion (*k*). And where a lunatic had been taken out of the country before the commission issued, an order was made that she should be brought back to England (*l*). A person found lunatic by a competent jurisdiction abroad may be considered for some purposes a lunatic here (*m*), but it would appear that a commission ought to issue here against a person so found, if he come within the jurisdiction (*n*).

Lunatics—
jurisdiction
over persons
in England,

Commissions of lunacy are also ordered, and inquiries held, in cases where the lunatic is not resident or present in England, but where there is property in England which requires the protection of the Court (*o*). It is, however, fairly clear, that an

or having
property in
England in
need of
protection.

(*f*) *Logan v. Fairlie* (1825), Jac. 193; *Lockwood v. Fenton*, 1 Sm. & G. 73.

(*g*) *Daniels v. Newton*, 8 Beav. 485; *Re Levinge*, 6 Beav. 392, n. See *Johnstone v. Beattie* (1843), 10 Cl. & F. 42.

(*h*) *In re Selot's Trusts*, [1902] 1 Ch. 488. *Worms v. De Valdor* (1880), 49 L. J. Ch. 261.

(*i*) *Re Burbidge*, [1902] 1 Ch. 426. *Re Sottomaioir* (1874), L. R. 9 Ch. 677.

(*k*) *Re Bariatinski* (1843), 1 Ph. 374; 13 L. J. Ch. 69.

(*l*) *Re Wykeham*, T. & R. 537.

(*m*) *Ex parte Gillam*, 2 Ves. Jun. 588. Cf. *Re Talbot*, 20 Ch. D. 269.

(*n*) *Re Houston* (1826), 1 Russ. 312.

(*o*) *Ex parte Southcote* (1751), 2 Ves. Sen. 401; *Re Scott* (1874), 22 W. R.

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adjudication of lunacy pronounced on this last ground would not be entitled to any international recognition, where the alleged lunatic was not domiciled or present within the assumed jurisdiction : and except so far as property within the same jurisdiction was concerned, would be inoperative.

So far, however, as relates to the title of a foreign curator to sue in England, it seems to follow from the judgment in *Didisheim's Case* (p), that the competence of the Court which appointed him will not in the first instance be inquired into, so long as he sues in the name of the lunatic as his next friend. As pointed out by Lindley, M.R., in that case anyone can sue as the friend of an alleged lunatic, subject to an application to stay, made by the alleged lunatic himself (if he asserts his sanity) or by any other "next friend" in his name; and subject, of course, to the action being stayed by an English inquisition of lunacy and the appointment of a regular committee. For the purpose of suing as next friend, a foreign curator is, at least, in as good a position as any other person; and questions as to the competence of the Court which appointed him need not arise in the absence of competition. It is probable that the English Court, if the fact of lunacy was seriously in dispute, would retain control of the property sought to be recovered until a commission of lunacy had been issued, and an inquisition held, in England.

Subject to the foregoing considerations, the property of a person declared lunatic by a foreign jurisdiction will be dealt with by the English Courts in conformity with the laws of the country where the lunacy has been declared (q). And a foreign curator has been held entitled to a transfer of funds in England, though the lunatic was English both by nationality and domicile (r). So it has been held that a *curator bonis* and *factor loco tutoris* of Scotch infants was not bound to pay into Court assets belonging to the infants, receivable under an English will of which the curator was administrator, and which was in the course of administration by the Court (s). But in a later case, where the lunatic was an Englishman by nationality and domicile, who had been adjudged a lunatic while transiently present in France, it was held by Malins, V.-C., that he had a discretion, and an order was made for the payment of the dividends only to the curator (t). The learned judge in that case, however, relied on

748. For service in a case where the alleged lunatic's presence was dispensed with, see *Re Lawrence*, 46 L. T. Rep. 668.

(p) (1900), 69 L. J. Ch. 443, 450.

(q) *Newton v. Manning* (1849), 1 Macn. & G. 362.

(r) *Hessing v. Sutherland*, 25 L. J. Ch. 687.

(s) *Mackie v. Darling* (1871), L. R. 12 Eq. 319.

(t) *In re Garnier* (1872), L. R. 13 Eq. 532. Cf. *In re Elias* (1851), 3 Mac. & G. 234. *In re Stark* (1850), 2 Macn. & G. 174. *In re Morgan* (1900), 1 H. & T. 212. *Volans v. Carr*, 3 De G. & M. 242. *In re Albo's Trust*, 7

the fact that the money had been paid into Court under the Trustees Relief Act, by the provisions of which a general discretion was given. It may be remarked that in *Didisheim's Case* (u), the Court of Appeal referred the decision in *In re Garnier* to the fact that the lunatic was a domiciled Englishman; and distinguished *In re Barlow's Will* (x) (where a like discretion had been exercised) on the ground that the foreign curator there had not express authority from the Court which appointed him to collect foreign assets, except so far as necessary for the maintenance of the lunatic. It is doubtful whether any discretion would now be claimed, if the lunatic was domiciled abroad, and a foreign curator with full powers sought to obtain possession of assets in England. An exception, however, has been made in the case of the proceeds of real estate in England, realised under the Partition Act, 1868, and retaining by the provisions of that statute the character of realty (y). In the case last cited, the income only was ordered to be paid to the curator.

Didisheim's Case was followed in *Pelegri v. Coutts & Co.* (z), where Sargant, J., held that the defendants, in refusing to transfer the securities lodged with them by the lunatic to his foreign curator without an order of the English Court, showed an undue and unreasonable excess of caution and that they must bear the costs of the action.

Under the Lunacy Regulation Act, 1853 (16 & 17 Vict. c. 70), s. 40, inquiries in lunacy are confined to the question whether the alleged lunatic is of unsound mind at the time of the inquiry, unless the Lord Chancellor specify a previous time to which the inquiry is to relate. And by the Lunacy Regulation Act, 1862 (25 & 26 Vict. c. 86), s. 3, no evidence of anything done or said by the person at any time more than two years before the date of the inquiry shall be receivable in evidence, unless the judge or master shall otherwise direct. It was held, in a case where an inquiry had been directed in England, and proceedings were also pending in Portugal (where the alleged lunatic was domiciled, though residing in England), that there was power, notwithstanding these statutes, to direct an inquiry from what time the lunatic had been of unsound mind, rogatory letters from the Court in Portugal having been received asking for such an

Time
inquired
into.

L. T. Rep. 778. Where the funds and securities are in England, the Court is entitled to exercise a discretion with regard to their transference to the foreign curator. As to the exercise of such discretion, see *Re De Larragotti*, [1907] 1 Ch. 14, C. A., where the Court (per Cozens-Hardy, M.R., at p. 19) refused to lay down rules governing it.

(u) (1900), 69 L. J. Ch. 443, at p. 453.

(x) (1887), 36 Ch. Div. 287.

(y) *Grimwood v. Bartels* (1877), 46 L. J. Ch. 788.

(z) [1915] 1 Ch. 696.

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Foreign
declaration
of lunacy—
how far
recognised.Property of
foreign
lunatic.

inquiry. In the particular case, though the jurisdiction was asserted, the Lords Justices refused to extend the scope of the inquiry in the manner asked for, on the ground that, according to the English practice, third persons whose interests might be involved in that question had no means of effectually defending their interests upon such an inquiry (*a*).

It has been said that to some extent a person found lunatic by a competent jurisdiction abroad may be considered lunatic here. But it was held that such a person, found lunatic at Hamburg by a proceeding in the nature of a commission of lunacy, was not within the Act 36 Geo. 3, c. 99, s. 3 (re-enacted 6 Geo. 4, c. 74), for facilitating transfers of stock standing in the names of lunatic or absentee trustee (*b*).

The right of a foreign curator, of the estate of a person found lunatic abroad, to sue in England for the property or *choses in action* of the lunatic, is now established subject to the following observations.

First, it would appear that the safer course is for the foreign curator to cause the action to be brought in the name of the lunatic suing by the curator as next friend. "Security for costs might be required from such a next friend if he was resident abroad, but no suit could be stayed simply because the next friend filled an official position in a foreign country" (*c*). The fact that the lunatic has property in England, to which the prerogative of the Crown in Lunacy matters might extend, is no bar to such an action, at any rate where the interference of the Crown has not been invoked by a petition for an inquisition or an application for the appointment of a receiver (*d*). There is some authority for saying that such foreign curator could sue in England in his own name (*e*), and in *Scott v. Bentley* (*f*) an order was made in Chancery directing payment to a Scotch curator (of a Scotch lunatic) of arrears of an annuity payable in England. It was, however, said by the Court of Appeal in *Didisheim's Case* (*d*), that V.-C. Wood, who decided *Scott v. Bentley* (*f*), would probably have directed the bill to be amended by making it in form a bill by the lunatic suing by the curator as next friend, if he had known the form of the order in *Morison's Case* (*g*),

(*a*) *In re Sottomaior* (1874), L. R. 9 Ch. 677.

(*b*) *Sylva v. Da Costa* (1803), 8 Ves. 316. Cf. *Ex parte Lewis*, 1 Ves. 298.

(*c*) *Didisheim v. London and Westminster Bank*, [1900] 2 Ch. 15, 44; 69 L. J. Ch. 442, 450.

(*d*) *Didisheim v. London and Westminster Bank*, [1900] 2 Ch. p. 45, citing *Seager Hunt's Case*, C. A. July 3, 1899.

(*e*) See per Parke, B., in *Alivon v. Furnival* (1834), 1 Cr. M. & R. 277, 296; *Johnstone v. Beattie* (1843), 10 Ch. F. 42; *Thiery v. Chalmers*, [1900] 1 Ch. 80; *In re Brown*, [1895] 2 Ch. 666; 64 L. J. Ch. 808.

(*f*) *Scott v. Bentley* (1855), 24 L. J. Ch. 244; 1 K. & J. 281; *New York Security Co. v. Keyser*, [1901] 1 Ch. 666.

(*g*) 1 Craigie Stewart and Paton, 454; Morrison's Decisions, 4595.

decided previously by the House of Lords. The point did not directly arise in *Didisheim's Case*, as the foreign curator was there suing in both capacities, *i.e.* in his own name as curator, and also as next friend of a lunatic plaintiff. It is possible that in any ordinary case, if the curator sued in his own name, and the objection were taken, the Court would allow the writ to be amended by adding as a plaintiff the foreign lunatic suing by the curator as his next friend, as was suggested by the Court of Appeal in *Didisheim's Case*; and the point is therefore not likely to arise for decision. It is, however, difficult to see any distinction between the title of the curator of a lunatic, and that of the assignee of a bankrupt, both taking by virtue of a universal assignment by operation of law; and the two cases must logically be governed by the same principles. It is suggested that the true rule is, that a foreign assignee by operation of law of the estate of a bankrupt or lunatic can only sue in his own name here (a) where he sues on a *chose in action* which is in its nature assignable or negotiable, on a bill of exchange, or (b) where the bankrupt has executed a written assignment and notice has been given so as to satisfy the Judicature Act, 1873, s. 25, sub-s. (6) (h). The latter alternative is of course inapplicable to the case of a lunatic.

It follows from the above considerations, that an action by a foreign curator of a lunatic or person of unsound mind should always be brought in the name not only of the curator, but in that of the lunatic also, suing by the curator as next friend. This course not only meets the difficulty dealt with above, but also the further possible objection that the property has not been judicially vested by the foreign Court in the curator, and that he has either no authority to collect, or that his authority is limited to assets within the jurisdiction of the Court by which he was appointed (i).

Secondly, the question of the competency of the foreign tribunal must be considered. In this connection, it may become necessary to draw a distinction between the jurisdiction which the English Courts claim for themselves, and that which ought to be allowed to others. In theory, the jurisdiction in question ought to be determined by the domicile of the alleged lunatic, on the principle of allowing questions of status and capacity to be

(h) *Jeffery v. McTaggart* (1817), 6 M. & S. 126; *Wolff v. Oxholme* (1817), *ibid.* 99; *O'Callaghan v. Thomond* (1810), 3 Taunt. 81; *Smith v. Buchanan* (1800), 1 East, 6. 11.

(i) *In re Barlow's Will* (1887), 36 Ch. D. 287; 56 L. J. Ch. 795; *In re Tarratt*, 51 L. T. Rep. (N.S.) 310; *In re De Linden*, [1897] 1 Ch. 453; 66 L. J. Ch. 295. See further *Hessing v. Sutherland*, 25 L. J. Ch. 687; *Newton v. Manning* (1849), 1 Mac. & G. 362; *Mackie v. Darling* (1871), L. R. 12 Eq. 319; *In re Elias* (1851), 3 Mac. & G. 234.

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determined by the *lex domicilii*. In *Didisheim's Case* (*k*), the Court of Appeal laid stress upon the fact that they were dealing with the case of an alien domiciled abroad, and intimated that they should not recognise the title of the curator under a foreign lunacy adjudication in the case of an Englishman temporarily abroad. It is, however, submitted that this reference to nationality has no serious meaning, and that the question really depends either upon domicile, or some residence or presence less than domicile. In favour of allowing the more extended jurisdiction, it may reasonably be urged that lunacy proceedings partake of the nature of police precautions, and are as necessary for the protection of the public in cases where the supposed lunatic is merely a visitor as in any others. An analogy may be found in the English rule as to *judicial separation*, which is ordered as a matter of protection and police guardianship in cases of residence as distinguished from complete domicile (*l*). Similarly, bankruptcy jurisdiction is asserted in the cases (*i*) of subjects, (*ii*) domiciled foreigners, (*iii*) all persons commorant or transiently present, who have committed an act of bankruptcy within the jurisdiction (*m*).

(*k*) (1900), 69 L. J. Ch. 442, 454.

(*l*) *Le Mesurier v. Le Mesurier*, [1895] A. C. 517; *Armstrong v. Armstrong*, [1898] P. 178.

(*m*) *In re Pearson*, [1892] 2 Q. B. 263; 61 L. J. Q. B. 585; *Ex parte Blain* (1879), 12 Ch. D. 522.

CHAPTER IV.

HUSBAND AND WIFE.

LEGITIMACY; MARRIAGE; DIVORCE AND
OTHER MATRIMONIAL CAUSES.PART I.
PERSONS.

CAP. IV.

(i) LEGITIMACY.

Legitimacy
in general.

CLOSELY connected with what has been called capacity is the subject of legitimacy, which generally becomes important in connection with the right of inheritance. Legitimacy is a matter of status; and different systems of law may give rise to different legal consequences of that status. Hence it may well be that our courts may be bound to recognise the legal consequences of a foreign status of legitimacy established in a way contrary to the provisions of English law. Further, the determination of such status by the personal law of the party concerned is not always possible, inasmuch as the domicile of a legitimately born child is usually that of its father, and of one illegitimately born either that of its mother or derived from the place of birth or place of discovery. Consequently a decision on the personal law may depend on a previous determination of the legitimacy. Again, the question of legitimacy involves that of the validity of some marriage either one made prior to the birth, or a *subsequens matrimonium*; and the validity of the marriage may depend on the validity of a divorce of one of the parties or both from a previous marriage. Subject to these circumstances it may be stated as a general rule that all persons issue of a lawful marriage, duly celebrated in any country whatever, are considered legitimate in England.

So far as succession to real estate or immovables is concerned, it was decided in *Doe d. Birtwhistle v. Vardill* (a), that the requisition of both the *lex situs* (the law of the country where the property is situate), and the *lex domicilii* must be complied

Succession
to real or
immovable
estate.

(a) (1826), 7 Cl. & F. 895; and as to succession under 3 & 4 Will. 4, c. 106, see *In re Don's Estate* (1857), 27 L. J. Ch. 99. The question of the legitimacy of the issue of a colonial marriage with a deceased wife's sister, for the purpose of inheriting English land, will be found discussed at the end of this chapter, p. 133; but this and similar questions must now be taken subject to the Acts of 1906 and 1907, *infra*.

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with; in other words, that a man to succeed to English land must be legitimate not only by English law, but also by his *personal* law, or the law of his domicile. According to Lord Cranworth, in *Shaw v. Gould* (b), the judges in *Birtwhistle v. Vardill* inclined to the opinion that for purposes other than succession to real estate, as controlled by the Statute of Merton (20 Hen. 3, c. 9) the law of domicile would decide the question of status involved. That this was the Scotch law had been already decided by the House of Lords in *Dalhousie v. McDouall* (c) and *Munro v. Munro* (d), where it was held that the child of a domiciled Scotsman, born in England before the marriage of his parents, was legitimated by the subsequent marriage of his parents in England, so as to succeed to realty situate in Scotland. It was expressly said in the judgment in these cases (which were argued together) that neither the law of the place of the birth, nor of that of the subsequent marriage, had any bearing upon the question, which was decided by the fact that the domicile of the father had been Scotch throughout. In the words of Lord Cottenham, "the question in such cases must be, Can the legitimation of the children be effected in the country in which the father is domiciled at their birth? for their legitimacy must be decided by the law of that country once for all." In *Shedden v. Patrick* (e) the question was whether the illegitimate child, born in America, of a domiciled Scotchman who afterwards married the mother, could inherit Scotch land, and it was decided that he could not, as he was an alien by birth, and not a natural-born British subject entitled to take British land under 4 Geo. 2, c. 21 (f), which is not satisfied unless a child is legitimate from his birth. Story (g) cites this case as an authority for the proposition that a person illegitimate by the law of his domicile of birth will be held illegitimate in England. By the law of his domicile of birth Story obviously means "the law of the *place* of his birth," ignoring the principle which would attribute to the child in that case the Scotch domicile of his father, and it is clear that for such an assertion of law there is no warranty in the decision adverted to. Lord Campbell expressly says in his judgment (h), that the question is not whether the child was made legitimate *per subsequens matrimonium*, but whether he was made a natural-born subject of the British Crown, so as to take British land under 4 Geo. 2, c. 21. In both of the other Scotch cases cited by

(b) (1868), L. R. 3 H. L. 70; 37 L. J. Ch. 433.

(c) (1840), 7 Cl. & F. 817.

(d) (1840), 7 Cl. & F. 842.

(e) (1854), 1 Macq. 535; see 4 Wils. & S. (Sc.) App. 5, p. 94.

(f) See *supra*, p. 8.

(g) Conflict of Laws, § 87 a.

(h) (1884), 1 Macq. at p. 611.

Story (i), the domicile of the father of the child whose legitimacy was in question, as well as the place of birth, was English; and they are not therefore authorities for the proposition that the legitimacy or illegitimacy of a child depends in any sense upon the law of the place of his birth, except in cases where that is also his domicile. It has been already pointed out that the domicile will be determined by the place of birth in some rare cases; but it often, of course, happens that the child inherits the domicile of that place from its father, or if illegitimate and unacknowledged, from its mother.

So far, however, as the right of succession to movables is concerned, it is now established that the *lex domicilii* is entitled to prevail in the question of the legitimacy of the successor. In cases of legitimisation *per subsequens matrimonium*, the effect of a change in the domicile of the father between the dates of the birth of the child and the subsequent marriage has been recently considered in the Court of Appeal (k). In that case it was distinctly held that the law of the father's domicile at both these dates must admit of legitimisation, in order to confer the status of legitimacy. "The domicile at birth must give a capacity to the child of being made legitimate; but then the domicile at the time of the marriage, which gives the status, must be domicile in a country which attributes to marriage that effect" (l). This carries the exigencies of English law a step further than it proceeded in *Re Wright's Trusts* (m), where it was held by Wood, V.-C., that the domicile at the time of the birth must prevail—in other words, that an illegitimate child, not receiving from the law of its father's domicile at its birth the capacity for subsequent legitimisation, cannot be legitimised by the subsequent marriage of its parents after a change of domicile to a more indulgent law. The effect of *In re Grove* is that the *lex domicilii* must be indulgent at both the critical dates. Bastardy by the *lex domicilii* at birth is indelible; and the sanction of the *lex domicilii* at the time of marriage is essential.

The case just cited (n) defined clearly for the first time the conditions under which legitimisation *per subsequens matrimonium*, according to the law of the domicile, would be recognised by English law; but it had been decided before that case, after some variance of judicial opinion, that, for the purposes of succession to movable estate, legitimacy by the *lex domicilii*,

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Succession
to movables.

Legitimisa-
tion *per*
subsequens
matri-
monium.

(i) *Munro v. Saunders* (1832), 6 Bligh, 468; and *The Strathmore Peerage Case* (1821), 4 Wils. & S. (Sc.) 89.

(k) *In re Grove, Vaucher v. Solicitor to Treasury* (1887), 40 Ch. D. 216.

(l) Per Cotton, L.J., 40 Ch. D. at p. 233, explaining his own judgment in *In re Goodman's Trusts* (1881), 17 Ch. D. 266.

(m) (1856), 2 K. & J. 595; 25 L. J. Ch. 621.

(n) *In re Grove, supra*.

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when such recognition was given to it, was all that would be required. In *Wright's Trusts* (*supra*) it was held that legitimacy by the *lex domicilii* was not established, for the reason given above; but had it not been assumed that such legitimacy, if established, would be sufficient for the purpose of succession to movable estate, the inquiry into the existence or non-existence of such legitimacy would have been meaningless. It is therefore somewhat remarkable to find the same judge (Wood, V.-C.) subsequently deciding in *Boyes v. Bedale* (o) that legitimacy by the law of the domicile, in the completest sense, was insufficient to entitle the claimant to succeed to movables under the word "children" in an English will. The decision was put mainly upon the doctrine that words in an English will must be construed by English law; and loses sight of the principle that English law adopts the *lex domicilii* in considering questions of personal status. Moreover, the learned judge in the same case expressed an opinion that the language of the Statute of Distributions, in a case of intestacy, would be dealt with in the same way. This dictum has, however, been expressly overruled in the more recent cases of *In re Goodman's Trusts* (p), *Andros v. Andros* (q), and *In re Grove* (*supra*) (r); and as it was said in the Court of Appeal, in the first of these cases, that the decision in *Boyes v. Bedale* was "contrary to principle and erroneous" (s), the case can now only be cited as a landmark. The law on the point cannot be better stated than in the language of James, L.J. (t): "The question is, What is the rule which the English law adopts and applies to a non-English child? This is a question of international comity and international law. According to that law as recognised, and that comity as practised, in all other civilised communities, the status of a person, his legitimacy or illegitimacy, is to be determined everywhere by the law of the country of his origin—the law under which he was born (u). It appears to me that it would require a great force of argument derived from legal principles, or great weight of authority clear and distinct, to justify us in holding that our country stands in this respect aloof from the rest of the civilised world. . . . The Statute of Distributions is not a statute for Englishmen only, but for all persons, whether English or not, dying intestate and domiciled in England, and not for any Englishman dying abroad. . . . And as the law

(o) (1863), 1 H. & M. 798.

(p) (1881), 17 Ch. D. 266.

(q) (1883), 24 Ch. D. 637.

(r) (1887), 40 Ch. D. 216.

(s) (1881), 17 Ch. D. at p. 296.

(t) *Re Goodman's Trusts* (1881), 17 Ch. D. at pp. 296–298.(u) That is, as is obvious from the context, not the law of the *place* of birth, but the law of the domicile of origin.

applies universally to persons of all countries, races, and religions whatsoever, the proper law to be applied in determining kindred is the universal law, the international law, adopted by the comity of States. The child of a man would be his child so ascertained and so determined."

It will be seen that the decision in *Goodman's Trusts*, from which the above quotation is taken, was on the Statute of Distributions. But it is obvious that the principle of the judgment is equally applicable to the case of a will, which was the precise point in *Boyes v. Bedale* (*supra*). On the next occasion when the construction of an English will came before the Court, Kay, J., followed the decision in *Goodman's Trusts* in preference to that in *Boyes v. Bedale*, and laid down the English law to be "that a bequest of personalty in an English will to the children of a foreigner means to his legitimate children; and that by international law, as recognised in this country, those children are legitimate whose legitimacy is established by the law of the father's domicile" (x). It has been already shown that this means the father's domicile both at the date of the birth and of the marriage through which legitimisation is claimed (y). The same rule has now been adopted with respect to a devise of English land (z); so that legitimacy is now decided by the *lex domicilii* for all purposes of succession, with the single exception of succession as heir to land in England.

"Child," therefore, means child by the *lex domicilii*, in the sense laid down by the judgments in the case of *In re Grove* (*supra*); and all other designations of kinship (such as grandson, nephew, and the like) are no doubt to be interpreted in the same way (a). The editor of the last edition of Story (b), obviously disapproving of the decision in *Re Goodman's Trusts* (*supra*), objects that "it seems to follow that the offspring of a connection that would not be treated as a marriage—for example, a polygamous marriage—would also be entitled as children, and that adopted children would have the same right." Adoption is not a *status*, nor does the idea of legitimacy enter into the conception, but so far as the offspring of a polygamous marriage is concerned, the question may of course some day have to be answered. It is submitted that the answer should be arrived at

(x) *Andros v. Andros* (1883), 24 Ch. D. 637.

(y) *In re Grove, Vaucher v. Solicitor to Treasury* (1887), 40 Ch. D. 216; *ante*, p. 117.

(z) *Re Grey's Trusts*, [1892] 3 Ch. 88.

(a) *In Re Ferguson*, [1902] 1 Ch. 483, however, a bequest to the next of kin of a deceased legatee was so construed as to admit a sister of the half blood, who would have been excluded by the law of the domicile of the deceased legatee. The judgment proceeded on the ground that the question was what the testator meant by "next of kin," and that no question of status or legitimacy arose.

(b) *Conflict of Laws*, ed. 1883, p. 146, n.

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by considering whether the State of the foreign domicile (or rather the jurisprudence of that State) attributed to such children the status of legitimacy in substantially the same sense as that of English jurisprudence. If so, there should be no reason for shrinking from the consequences. The necessity of fixing the attention upon the question of *legitimacy*, as distinguished from the consequences attributed by the law of foreign domicile to the fact of paternity, is illustrated by the case of *Atkinson v. Anderson* (c). In that case an Englishman acquired an Italian domicile, and became the father, in Italy, of four children, all recognised by him in his lifetime. The law of Italy gives the right of succession to natural-born children who have been so recognised. By a will duly made in English form, the father devised to these children *nominatim* real estate in England. The proceeds of this real estate having been paid into Court, it was held that the Crown was entitled to succession duty at the rate of 10 per cent., on the ground that the devisees were strangers in blood by English law to the testator. This case has been criticised as a refusal to extend the principle of *Goodman's Trusts*, but it is submitted that it is perfectly in accordance with its spirit. The children in question were not legitimate by the law of their domicile. They were natural children, recognised by their father in his lifetime, to whom the law of their domicile gave the right of succession in Italy. By the law of England, natural children not regarded as legitimate by the law of their domicile are strangers in blood to their putative father; and the succession duty was assessed accordingly. Had they been claiming under an intestacy to share in the English personalty, the decision, it is submitted, would have been equally adverse to their rights. No law of a foreign country can give natural-born children the rights of legitimacy, or some of those rights, which will be recognised in England, except by declaring them legitimate. This condition was fully satisfied in *Skottowe v. Young* (d), where the legatees of a domiciled Frenchman were his daughters, born in France and there legitimated *per subsequens matrimonium*, and legacy duty at 1 per cent. only was charged.

In *Levy v. Solomon* (e) an attempt was made to set in competition with the *lex domicilii*, on the same question of legitimisation *per subsequens matrimonium*, the laws or customs of a religious sect to which all the parties belonged. The testator, the parents, and the child whose legitimacy was in question, were all Jews domiciled in England, and evidence was offered to show that the rules of their religion, which they recognised as binding

(c) (1882), 21 Ch. D. 100.

(d) (1871), L. R. 11 Eq. 474; 40 L. J. Ch. 366.

(e) (1877), 37 L. T. 263.

laws among themselves, authorised that legitimation by a subsequent marriage between the parents which it was sought to support. Whether, however, this so-called law was regarded as the law common to the parties, or as a *quasi*-domiciliary law, the contention was equally untenable. In such matters the law of the domicile is not regarded because it may be presumed to express the intention of the parties, but because the interests of the general body of the inhabitants of the country in which they live require its adoption. Neither a religious sect nor any other self-constituted body can be permitted to set up a claim to an *imperium in imperio*—the assertion of any other personal law within its domain.

Even if the decision of the domiciliary law of a person on his legitimacy was accepted by the law of a foreign country for any purpose, another condition would have to be complied with; viz. that there should be nothing absolutely repugnant to the law of that foreign country in what it was asked to accept. In *Fenton v. Livingstone* (f), a Scotch case on appeal to the House of Lords, the legitimacy of a claimant to succeed to Scotch land by inheritance was in question. The claimant was the issue of the marriage of a widower domiciled in England with his deceased wife's sister, the marriage having been contracted in England in 1808. At that time such marriages were voidable only, and not void by English law, and, if proceedings were not taken to declare them null before the death of either of the parties, could not be questioned afterwards. The claimant was, nevertheless, though domiciled in England from his birth, held to be illegitimate by Scotch law. "It must be granted," said Lord Brougham, "that the general rule is to determine the validity of a marriage by the law of the country where the parties were domiciled, and in most cases the legitimacy of a party is to be determined by the law of his birth-place and of his parents' domicile. But to this . . . there are exceptions from the nature of the case in which the question arises. Thus, in deciding upon the title to real estate, the *lex loci rei sitæ* must always prevail, so that a person legitimate by the law of his birth-place, and the place where his parents were married, may not be regarded as legitimate to take real estate by inheritance elsewhere. . . . Was, then, the marriage of the respondent's parents such that the law of Scotland could recognise its validity, in dealing with the rights of the issue of it to real estate by inheritance?" (g). Lord Brougham then proceeded to state that, though the marriage could not be questioned in England after the death of the parties, yet it was illegal there, and that the law of Scotland was even more stringent on the point than the

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by *lex*
domicilii
must not be
repugnant to
lex fori.

(f) (1859), 5 Jur. (N.S.) 1183.

(g) 5 Jur. (N.S.) 1183, 1184.

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law of England. By the law such a marriage was regarded as incestuous, and as actually amounting to a crime; and, therefore, even if the Scotch law could accept the decision of the foreign domiciliary law at all on the question of legitimacy to succeed to Scotch land, it could not do so where the recognition of such legitimacy would be absolutely repugnant to its own principles. So, again, it was said by Littledale, J., in *Birtwhistle v. Vardill* (*h*), that personal status does not follow a man everywhere, if its consequences are opposed to the law of the country where he goes, and where it is sought to introduce them. The decision in *Compton v. Bearcroft* (*i*), the case which first recognised the validity in England of Scotch marriages, was similarly explained by subsequent judicial authority to be that "a Scotch marriage was valid in England, if there was nothing in it contrary to the law of England" (*k*).

Statutory
declaration of
legitimacy.

Under the Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), any natural-born British subject, or any person whose right to be deemed a natural-born British subject depends on his legitimacy or on the validity of a marriage may, if he is domiciled in England or Ireland, or claims real or personal estate (*l*) situate in England, petition the Court for a decree declaring that he is legitimate, and that the marriage of his father and mother, or of his grandfather and grandmother, was valid (*m*); and such decree is in the nature of a judgment *in rem* and binding on all (*n*). But the decree of the Court will not prejudice any person, unless such person has been cited or made a party to the proceeding, or is the heir-at-law or next-of-kin, or other real or personal representative of, or derives title under or through, a person so cited or made a party; nor will it prejudice any person,

(*h*) (1826), 5 B. & C. 455.

(*i*) (1769), Bull. N. P. 113.

(*k*) *Harford v. Morris* (1776), 2 Hagg. Cons. 435.

(*l*) The words "real or personal estate" must probably be construed, as Dicey points out (*Conflict of Laws* (1908), p. 273), to mean land or immovables; as the expression "personal estate" can, in this connection, scarcely include goods or choses in action.

(*m*) For examples of this jurisdiction being exercised, with regard to marriages celebrated abroad, see *Scott v. Att.-Gen.* (1886), 11 P. D. 128 (where H, a natural-born British subject domiciled in England, married first in Cape Town, and then in London, W, who had been divorced at Cape Town from her husband for adultery with H. Under the law of Cape Town the validity of either marriage was doubtful. Hence H petitioned for a decree, to declare his marriage with W to be valid). *Brinkley v. Att.-Gen.* (1890), 15 P. D. 76 (where X, a natural-born British subject domiciled in Ireland, temporarily residing in Japan, there married a Japanese woman with the due formalities of Japanese law, and afterwards petitioned for a declaration that his marriage was valid). A declaration of heirship, however, cannot be claimed under this statute to the exclusion of another person, though this can be determined only by proof of the other person's illegitimacy (*Mansel v. Att.-Gen.* (1879), 4 P. D. 232); nor the title to a baronetcy or other title of honour (*Frederick v. Att.-Gen.* (1874), L. R. 3 P. & D. 196).

(*n*) s. 1.

if it is subsequently proved to have been obtained by fraud or collusion (o). In the same circumstances and for the same reasons as those specified in s. 1, any person may also apply by petition to the Court for a decree declaring his right to be deemed a natural-born British subject (p).

It has been observed that the statute does not interfere with the decisions of *Birtwhistle v. Vardill* (q), and *In re Don's Estate* (r), adverted to above; and that a declaration of legitimacy under it would not enable a man born before wedlock to take English land by descent. In the words of Lord Brougham in *Birtwhistle v. Vardill* (s), giving the effect of the opinion of the judges, "the statute, or rather the Common Law recognised and declared by the statute, requires something more than mere legitimacy to make an heir to real estate in England—it must be legitimacy *sub modo*—legitimacy and being born in wedlock."

(ii) MARRIAGE.

The question of what law must be applied to test the validity or invalidity of a marriage is so intimately connected with this part of the subject that it is convenient to discuss it here, though not coming under the heading of status, strictly speaking. It will be necessary to consider, first, what law decides whether the marriage has been validly contracted; and secondly, what law decides, in the case of attempted divorce, whether it has been effectually dissolved.

(a) With regard, in the first place, to the validity of the marriage when entered into, it was clearly laid down in *Brook v. Brook* (t), by Lord Campbell, that the *essentials* of a marriage contract were to be regulated by the *lex domicilii* of the contracting parties, the *forms* by the *lex loci celebrationis*. "The *lex loci contractus* must *quoad solemnitates* determine the validity of the contract" (u). The difference between *essentials* and *forms* in such a matter would naturally seem to be that between prohibitions which forbid, and prohibitory directions which merely impede, the marriage. This is, in fact, the result of the modern cases, which at first sight seem rather contradictory, on

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by the
lex loci
essentials by
the *lex*
domicilii.

(o) s. 8.

(p) s. 2.

(q) (1826), 7 Cl. & F. 895.

(r) (1857), 27 L. J. Ch. 99.

(s) At p. 954. See as to the right of succession to chattels real, the note at the end of chap vi. (*infra*).

(t) (1861), 9 H. L. C. 193. Cf. *Mette v. Mette* (1859), Sw. & Tr. 416; *Re De Wilton, De Wilton v. Montefiore*, [1900] 2 Ch. 481; *Re Bozelli's Settlement*, [1902] 1 Ch. 751; *Ogden v. Ogden*, [1908] P. 46, C. A.; *Re Green, Noyes v. Pitkin* (1909), 25 T. L. R. 222.

(u) *Brook v. Brook* (1861), 9 H. L. C. 193, per Lord Cranworth, at p. 224. Cf. also *Marshall v. Marshall* (1908), *The Times*, March 10.

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the subject. If the parties can, by complying with certain regulations or obtaining the consent of certain people, intermarry in the country of the matrimonial domicile, the performance of those conditions will not be required by an English Court, which will recognise the marriage as valid, provided the ceremonials and preliminaries required by the law of the place of celebration have been complied with (x). Thus the religious or ecclesiastical law of a Church will be disregarded if the requirements of the *lex loci celebrationis* have been complied with. So in *Ussher v. Ussher* (y) it was held that a marriage effected in accordance with the law of the land and followed by cohabitation is not invalidated by the fact that such marriage is void by the law of the Roman Catholic Church, and that the parties, had they known this, would not have entered into the marriage contract. This principle was followed in *Despatie v. Tremblay* (z), where a marriage was contracted by parties who were cousins of the fourth degree and could not marry without a dispensation. At the time of the marriage the parties were unaware of their relationship, and consequently no dispensation had been obtained. Since the marriage was contracted in good faith and all legal formalities observed, it was declared by the Judicial Committee valid and subsisting.

In *Pepper v. Pepper* (a) a decree *nisi* of nullity was pronounced. In this case the man had only resided in Edinburgh twenty days instead of the twenty-one days required by Lord Brougham's Act (19 & 20 Vict. c. 96). It appeared that that according to the usual method of computing time as adopted by Scots law would exclude the day of arrival from the reckoning.

Where the defendant or prosecution rely on the validity of foreign marriage, proof must be given by a qualified person : *Rex v. Naguib*, 116 L. T. 640 (1916).

[Further, English law will not necessarily hold a marriage contracted without such preliminaries to be essentially invalid, even if the *lex domicilii* makes such a marriage voidable at a subsequent date (b). But if the *lex domicilii* makes it void *ab initio* through lack of consents or other preliminaries, then English law will hold it invalid; as will also be the view if the marriage takes place in the country whose law demands the consents, &c.] If it is for any reason impossible to comply with the forms of the *lex loci*, British subjects may enter into a valid

(x) *Ogden v. Ogden*, *supra*, where many of the earlier cases are considered. Cf. *Lacon v. Higgins* (1822), 3 Stark. 178; and *Re Alison's Trusts* (1874), 31 L. T. 638; *Cheang Tye Phin v. Tan Ah Loy*, [1920] A. C. 369.

(y) [1912] 2 I. R. 445.

(z) [1921] 1 A. C. 702.

(a) (1921), L. J. Newsp., p. 413.

(b) *Ogden v. Ogden*, [1908] P. 46, C. A.

marriage if celebrated according to the English common law, and aliens may perhaps do so *quoad* English law, if celebrated according to the law of their domicile (c). If, on the other hand, the parties are forbidden by the law of the domicile to intermarry at all, they cannot, except by a change of domicile, escape from that prohibition. The matrimonial domicile being the place where the law presumes that the parties intend to spend their married life, the propriety of this rule is obvious. If the *lex loci celebrationis* is English, our Courts will disregard any prohibition imposed by the *lex domicilii* of either of the parties, if such prohibition be of a penal character, or of a kind not recognised by English law (d). Thus, with regard to the essential validity of marriage, the nationality of the parties (e), the place where the marriage was celebrated (f), the fact that it was sanctioned by the religion of the parties (g), are all immaterial considerations. Generally speaking, the marriage must be valid by the law of the domicile of both parties, except that where one of the parties is domiciled in England and the marriage is there celebrated, the English Courts will not hold the validity to be impaired if the law of the other party's domicile imposes an incapacity not recognised by English law (h).

Most of the cases were thought to involve a question of capacity, and have been referred to under that heading (i). It will be necessary, however, briefly to enumerate them here.

The case of *Brook v. Brook* has already been referred to. That was the marriage of a man with his deceased wife's sister, both parties being domiciled in England and having gone to Denmark, where such unions are permitted, for the purposes of celebration. It was not, as has been pointed out, decided that

(c) Cf. *Lautour v. Teesdale* (1816), 8 Taunt. 330 (where the impossibility arose from the fact that there was no *lex loci* applicable to the marriage of Europeans at Madras); *Ruding v. Smith* (1821), 2 Hag. Con. 371 (where the impossibility was due to the fact that the Dutch law in the Cape of Good Hope did not apply to British subjects passing through the territory at a time so soon after the conquest that its future law was not settled). See *Ex parte Mir-Anwaruddin*, [1917] 1 K. B. 634.

(d) *Chetti v. Chetti* (1908), 25 T. L. R. 146 (which was a case of a marriage celebrated in this country between a domiciled Englishwoman and a Hindoo, who afterwards alleged that by Hindoo religion and law—the law of his domicile and his personal law—the marriage was invalid).

(e) *Mette v. Mette* (1859), 1 Sw. & Tr. 416.

(f) *Brook v. Brook* (1861), 9 H. L. C. 193.

(g) *Re De Wilton, De Wilton v. Montefiore*, [1900] 2 Ch. 481.

(h) *Chetti v. Chetti* (1908), 25 T. L. R. 146; *Sottomayor v. De Barros* (1877), 3 P. D. 1, C. A., and (1879), 5 P. D. 94. On the last-mentioned case see further *infra*, p. 128. Cf. *Swifte v. Att.-Gen. for Ireland*, [1912] A. C. 276, where it was held that the Irish statute, 19 Geo. 2, c. 13, s. 1, declaring null and void any future marriage between a Papist and a Protestant, or between two Protestants, if celebrated by a Popish priest, was not extra-territorial in its operation, and whilst it was in force did not affect a marriage between a domiciled Irish Protestant and a foreign Roman Catholic, celebrated by a Roman Catholic priest in a foreign country.

(i) *Supra*, pp. 101-2 *seq.*; see also *infra*, chap. viii. "Capacity to contract."

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they were *incapable* of marrying; but that they were *forbidden* by the law of their domicile to do so, and that the marriage was therefore illegal. Lord Campbell, laying down that the *essentials* of a marriage were to be governed by the *lex domicilii*, rightly decided that such illegality was an essential, and that there had been in the eye of the law no marriage at all. It should be observed that the parties, according to English law, could not then intermarry, whatever forms or preliminaries they fulfilled; and the case therefore differs entirely from those later ones in which it has been held that parties, forbidden to marry by the law of their domicile without certain consents and authorisations, may nevertheless do so in England, provided the English forms are complied with. The principle of *Brook v. Brook* is also exemplified in the somewhat earlier case of *Mette v. Mette* (*k*), the marriage of an alien domiciled and naturalized in England with his deceased wife's sister being similarly held void. The case is only noticeable because the man's English domicile was acquired, and not that of his birth, which of course does not affect the real principle. Still, it should be observed that the marriage was in that case valid both by the law of the place of celebration and by that of the domicile of origin, the law of the actual domicile at the time of the marriage being alone regarded.

The earlier case of *Conway v. Beazley* (*l*) was not in reality a decision as to the validity of a marriage (though apparently so), but as to the validity of a divorce. The head-note, no doubt, enunciates that the *lex loci contractus* will not prevail when either of the contracting parties is under a legal incapacity by the law of his domicile; but in reality there was no question of capacity or incapacity in the case. The "incapacity" depended upon the simple fact whether the husband was or was not already married at the time of the marriage which it was sought to annul; and it was undeniable that he was already married, in the eye of the English law, unless a Scotch divorce was to be held by English law competent to dissolve a marriage previously celebrated in England. Such a proposition was untenable, as will be presently shown (*m*), and the second marriage was therefore rightly declared void.

In *Simonin v. Mallac* (*n*) a conflict between the *lex domicilii* and the *lex loci celebrationis* directly arose, with regard to the preliminaries to marriage required by the former. The marriage which it was sought to dissolve was one celebrated in England

(*k*) (1859), 1 Sw. & Tr. 416.

(*l*) (1831), 3 Hagg. Eccl. 639.

(*m*) *Infra*, p. 142; *Lolley's Case* (1812), R. & R. 237; *McCarthy v. De Caix* (1831), 2 Russ. & My. 614; *Warrender v. Warrender* (1835), 2 Cl. & F. 550.

(*n*) (1860), 2 Sw. & Tr. 67; 29 L. J. P. & M. 97.

between French subjects domiciled in France without the formal consents required by the French law, and had been declared void by a French Court on that ground. Sir Cresswell Cresswell decided that the marriage was valid, chiefly on the ground that the personal competency or incompetency of individuals to contract depends upon the law of the place where the contract is made. It has already been pointed out that a more logical view is obtained by regarding the question, not as one of the competency of an individual, but of the legality of a marriage. The parties were not prohibited from marrying by the law of their domicile absolutely, but prohibited from marrying without certain preliminaries. Such a prohibition did not touch the *essentials*, but the *forms*, of the marriage, and these are governed, according to *Brook v. Brook* (o), by the law of the place of the celebration alone. It cannot, of course, be assumed that if such a marriage were questioned in the country of the domicile, the law of which required the consents which had been dispensed with, this view would be taken there. The law of the domicile would possibly persist in regarding the preliminaries which it had imposed as *essential*, and assert its right to insist upon them, although the marriage was celebrated elsewhere; but as the law of England has now no similar provisions, and imposes no preliminaries but such as it would regard as ceremonial merely, the question has little practical importance for English jurists (p). The view, however, which had been suggested above, that all such consents are ceremonial preliminaries only, was taken in the Irish case of *Steele v. Braddell* (q), referred to with approval by the House of Lords in *Brook v. Brook* (r). "This was a marriage," says Lord Campbell in that case, "between parties who might with the consent of parents and guardians, have contracted a valid marriage according to the law of the country of the husband's domicile. . . . If the union between these parties had been prohibited by the law of Ireland (the law of the domicile) as contrary to the law of God, undoubtedly the marriage would have been dissolved."

Re Alison's Trusts (s) was the case of a marriage at Teheran, in Persia. By Persian law Christian marriages are recognised, if valid according to the religion of the parties. The marriage was between an English Protestant and an Armenian Protestant woman. The pregnancy of the woman at the time rendered her incapable of contracting a marriage according to the doctrine of

(o) (1861), 9 H. L. C. 193.

(p) See *Scrimshire v. Scrimshire* (1752), 2 Cons. 395; *Middleton v. Janverin* (1802), 2 Cons. 437; *Compton v. Bearcroft* (1769), 2 Cons. 444.

(q) (1838), Milw. Eccl. Rep. Ir. 1.

(r) (1861), 9 H. L. C. p. 216.

(s) (1874), 23 W. R. 226; 34 L. T. Rep. (N.S.) 638.

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her own Church, and the ceremony was performed by a Roman Catholic priest. The so-called incapacity of the woman was in this case only important as the *cause* that the formalities of the *locus celebrationis* were not complied with. As a matter of fact, there seems to have been no law according to which the marriage could have been supported; and it is noteworthy that no attempt was made by the man (who was actually the vice-consul) to avail himself of the provisions of the Consular Marriages Act (12 & 13 Vict. c. 68) (*infra*).

But in *Cheang Thye Phin v. Tan Ah Loy* (t), where a Chinese merchant married the respondent as a secondary wife, it was held by the Judicial Committee that, although some sort of ceremony was usual in China, proof of such a ceremony was not essential to establish the relationship of husband and wife.

Sottomayor v. De Barros (u), the next case on this subject, comes almost exactly within the meaning of the distinction drawn by Lord Campbell in *Brook v. Brook*, above cited. The parties there were domiciled Portuguese, forbidden by Portuguese law to intermarry at all on the ground that they were first cousins. Sir R. Phillimore, in the Court of first instance, held that their marriage celebrated in England was valid, conceiving himself to be bound by the decision in *Simonin v. Mallac* (x). The Court of Appeal, however, reversed his judgment, holding that as the parties were absolutely forbidden to marry by the law of their domicile, they could not escape from this prohibition by transient presence and celebration in England, and that the possibility of escaping from Portuguese law by a Papal dispensation was immaterial. "No country is bound to recognise the laws of a foreign State when they work injustice to its own subjects, and this principle would prevent the judgment in the present case being relied on as an authority for setting aside a marriage between a foreigner and an English subject domiciled in England, on the ground of an incapacity not recognised by the laws of this country" (y). The wording of the judgment of the Court of Appeal rested on the more than questionable principle (z) that the capacity of a person to contract was tested by

(t) [1920] A. C. 369.

(u) (1877), 3 P. D. 1, C. A.; and (1879), 5 P. D. 94; *Fenton v. Livingstone* (1859), 5 Jur. (n.s.) 1183. *Sottomayor v. De Barros* was decided by the Court of Appeal on the assumption that the domicile was Portuguese. The decision having been on the pleadings only, the case was remitted for trial to the Probate Division. Hannen, J., in the subsequent proceedings, found that the domicile of the respondent was in fact *English*, though that of the wife was Portuguese, and the petition was ultimately dismissed, the marriage having thus been declared valid; *Sottomayor v. De Barros* (2) (1879) 5 P. D. 94; 49 L. J. P. & M. 1.

(x) (1860), 2 Sw. & Tr. 67.

(y) *Sottomayor v. De Barros*, *supra*, per curiam at p. 7.

(z) *Supra*, p. 101; *infra*, chap. vii. (ii). Westlake, Priv. Int. Law, §§ 21,

his personal law; but the distinction between this case and that of *Simonin v. Mallac* is plain, and the actual result of the decision of the Court of Appeal is clearly in accordance with *Brook v. Brook (a)*.

In *De Wilton v. Montefiore (b)* it was decided that a marriage between a woman and her maternal uncle (both being Jews), valid by Jewish custom and by the law of the place of celebration, was governed as to its validity by the law of the domicile of the parties. Such domicile being English the marriage was held void. Probably the same result would have been arrived at if the domicile of the woman only, or of the man only, had been English. If such marriage had been permitted by the law of the domicile of the man, it would have been begging the question to say that the law of his domicile should prevail; because, unless he became the woman's true husband, the law of his domicile could not affect her.

Ruding v. Smith (c), though one of the earliest cases on this subject, having been decided by Lord Stowell in 1821, has been purposely left for consideration until the tendency and principles of the modern decisions had been sufficiently indicated. That was a marriage celebrated at the Cape of Good Hope while under military occupation of the British forces immediately after its acquisition, and the ceremony was performed by the chaplain-general under the sanction of the military authorities, according to British forms. Both the contracting parties were British by nationality and domicile. The validity of the marriage was impeached on two grounds; first, that the Dutch law, as the *lex loci celebrationis*, prohibited the parties from marrying at their respective ages without the consents of parents and guardians, which had not been obtained; and, secondly, that the ceremony had not been performed according to the forms required by the same law. According to the principles already stated, it will be seen that the *lex loci celebrationis* was *prima facie* the law to decide both these questions, but in the particular case there were exceptional circumstances to be considered. By the capitulation of the colony it had been stipulated that the conquered should retain certain privileges, including the enjoyment of their own

25, and Dicey, *Conflict of Laws*, p. 683, also doubt the authority of *Sottomayor v. De Barros*; but it was regarded as a valid judgment by the Court of Appeal in *Ogden v. Ogden*, [1908] P. 46, C. A.; and also in *Chetti v. Chetti* (1908), 25 T. L. R. 146, Barnes, P., expressed a view contrary to that of the learned authors referred to.

(a) (1861), 9 H. L. C. 216.

(b) [1900] 2 Ch. 481. Cf. the extra-judicial language of Lord Cairns, C., in the House of Lords, quoted from Hansard, *infra*, p. 132. An earlier case involving a Jewish marriage is exemplified in *Lindo v. Belisario* (1795), 1 Hag. Con. 216.

(c) (1821), 2 Hag. Cons. 371.

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laws and customs, and Lord Stowell deduced from this that the *lex loci* had been altered for all others except those in whose favour the stipulation was made—that for British domiciled subjects with the British forces, in short, the *lex loci* was in fact British. On this view the decision was not that the *lex domicilii* must prevail in such matters when in conflict with the *lex loci*, but that the law common to the parties had, under the peculiar circumstances of the case, taken the place of the latter. The case of *Harford v. Morris* (d) similarly depended upon the exceptional facts in it, which render it of no authority on the question of the competition of the law of the domicile and that of the place of celebration.

Marriages
recognised by
English law.

Marriage
must be that
which the
lex fori
recognises
as such.

It has been seen above that the English law, still following the principle of *Brook v. Brook* (e), refers the essentials of a marriage to the law of the domicile. This must, however, be taken subject to the qualification that it will not allow anything to be called marriage, either by the law of the domicile or the place of celebration, which it does not itself recognise as such; and accordingly, in *Hyde v. Hyde* (f), the Probate and Divorce Court refused to acknowledge a Mormon marriage apparently celebrated in Utah, though both the contracting parties were single at the time of the so-called marriage, and had never assumed to contract another. “Marriage as understood in Christendom may . . . be defined as the voluntary union for life of one man and one woman to the exclusion of all others” (g). It was said in that case by the Judge-Ordinary (Sir C. Cresswell) that a marriage in Christendom was an entirely different thing, both in its essence and incidents, from what was called a marriage in a country where polygamy was practised; and he referred to the case of *Ardaseer Cursetjee v. Perozeboye* (h), where the Privy Council held that Parsee marriages were not within the force of a charter extending the jurisdiction of the Ecclesiastical Court to Her Majesty’s subjects in India “so far as the circumstances and occasions of the said people shall require.”

The same principle must of course be applied to incestuous marriages; but the question how far the incestuous character of the marriage is to be determined by the *lex fori*, as distinguished

(d) (1821), 2 Hagg. Cons. 371.

(e) (1861), 9 H. L. C. 193.

(f) (1866), L. R. 1 P. & D. 130.

(g) Per Lord Penzance, *ibid.*, at p. 133.

(h) (1856), 10 Moo. P. C. 375, 419. So with regard to a marriage in native form with a native woman in South Africa, belonging to a tribe which practised polygamy (*Bethell v. Hildyard* (1888), 38 Ch. Div. 220). Cf. *Harvey v. Farnie* (1880), 6 P. D. 35, C. A., per Lush, L.J. But a Japanese marriage essentially monogamous has been recognised, though not Christian, and though polygamy is in Japan in certain circumstances lawful (*Brinkley v. Att.-Gen.* (1890), 15 P. D. 76).

from the *lex domicilii*, has been much debated, and has not until recently been expressly decided by any English Court. It has, however, now been held that "incestuous" for this purpose means incestuous by the general consent of Christendom (i); and on this ground a marriage with a deceased husband's brother, valid by the law of the domicile of the parties, has been recognised in this country (k). It is obvious that the principle of this decision must be applicable to the commoner case of marriage with a deceased wife's sister; and in face of the fact that Colonial statutes recognising the validity of such marriages have repeatedly received the sanction of the Crown, it would have been difficult even before *In re Bozelli* to have maintained the contrary view. The most authoritative exposition of English views on this subject are to be found in the judgments of Lord Campbell, C., and Lord Cranworth in *Brook v. Brook* (l), in which case it was expressly decided that a marriage solemnised in Denmark (where such marriages are valid) between a man and his deceased wife's sister, both parties being domiciled in England, was null and void.

Per Lord Campbell, C. : "A marriage between a man and the sister of his deceased wife, both being Danish subjects domiciled in Denmark, may be good all over the world; and this might likewise be so, even if they were native-born English subjects, who had abandoned their English domicile, and were domiciled in Denmark."

Per Lord Cranworth : "The rule in this country, and I believe generally in all countries, is that the marriage, if good in the country where it was contracted, is good everywhere; subject, however, to some qualifications, one of them being that the marriage is not a marriage prohibited by the laws of the country to which the parties contracting matrimony belong." The judgment of the Lord Chancellor shows that "belong" in this sentence means "belong by domicile."

Story (m), after stating the general proposition that marriages valid where they are contracted are valid everywhere (a proposition which in English law must be confined to *formalities*), proceeds : "Christianity is understood to prohibit polygamy and

(i) As an illustration of this principle, compare the case of marriage with a deceased wife's sister, contracted abroad before the Deceased Wife's Sister Marriage Act, 1907, which was, technically, incestuous by English law, though actually recognised as valid in English colonies by the Colonial Marriages (Deceased Wife's Sister) Act, 1906.

(k) *In re Bozelli*, [1902] 1 Ch. 751. As to polygamous unions, see *Bethell v. Hildyard* (1888), 38 Ch. 220; *Hyde v. Hyde* (1866), L. R. 1 P. & M. 130; *Brinkley v. Att.-Gen.* (1890), 15 P. D. 76. Cf. also *Warrender v. Warrender* (1835), 2 Cl. & Fin. 488, H. L., at p. 532, per Lord Brougham, L.C.; *Chetti v. Chetti* (1908), 25 T. L. R. 146, at p. 150.

(l) (1861), 7 H. L. C. 193, 212, 224, 226.

(m) Conflict of Laws, §§ 113-4.

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incest; and therefore no Christian country would recognise polygamous or incestuous marriages. But when we speak of incestuous marriages, care must be taken to confine the doctrine to such cases as by the general consent of all Christendom (*n*) are deemed incestuous." Of this passage Lord Cranworth approves, saying that, when correctly interpreted, it is strictly concurrent to the law of nations (*o*). It must not, however, be overlooked that Lord St. Leonards in the same case took a different view; and expressed an opinion that marriages within the degrees of affinity prohibited by English law were to be regarded as contrary to the law of God, and on the same footing as incestuous unions (*p*). Both these expressions of opinion, however, were unnecessary to the decision of the case then before the Court; which was that of a marriage (within the prohibited degrees) of a man and woman whose domicile was English.

The principle that a marriage between persons who were forbidden to intermarry by the law of their domicile is invalid wherever celebrated was extended in *Sottomayor v. De Barros* (*q*) (1877) to the case of first cousins domiciled in Portugal, and forbidden by the law of that country to intermarry. In a later stage in the same litigation, it was ascertained that the domicile of the *husband* at the time of the marriage was English; and thereupon the validity of the marriage was admitted. It would appear from the judgment of Sir J. Hannen that the decision would have been the same if the woman and not the man had been domiciled in England. It is, however, manifest that such a proposition might lead to most inconvenient consequences. The domicile of the man is the matrimonial domicile, where the parties presumably intend to establish their home; and the claims of the law of the matrimonial domicile to decide as to the validity of the marriage of those who live under its protection are certainly stronger than those of the law of the domicile which the woman has abandoned.

The language of Lord Cairns in the House of Lords in 1883, though not spoken judicially, may be usefully cited here. "My view of the law upon this point is this—that if a man, being domiciled in a colony in which it is lawful to marry a deceased wife's sister, does marry his deceased wife's sister, his marriage

(*n*) It appears that the expression "Christendom" refers to civilised nations in general, and not merely to such as profess the doctrines of Christianity; and the phrase "Christian marriage" is used as a phrase of convenience to denote a marriage based on Christian ideas. (Cf. *Brinkley v. Att.-Gen.* (1890), 15 P. D. 76).

(*o*) *Brook v. Brook* (1861), 9 H. L. C. 226, 233.

(*p*) Cf. the previous note as to marriage with a deceased wife's sister, and the Acts of 1906 and 1907 relative thereto mentioned *infra*, pp. . . .

(*q*) (1877), 3 P. D. 1; (1879), S. C. 5 P. D. 94. And cf. *Mette v. Mette* (1859), 1 Sw. & Tr. 416.

with her is good all the world over; whereas if the man is a domiciled Englishman not domiciled in the colony, but merely resident there, his marriage with his deceased wife's sister in such circumstances is bad everywhere, because he carries the impediment of his domicile to such a marriage with him" (r).

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In the case of a marriage good by the *lex domicilii* of the parties, and recognised as such by English law, it would have seemed *prima facie* that the offspring would be regarded as legitimate for all purposes. The single case, however, of inheritance by heirship to English land requires consideration. It was established in *Birtwhistle v. Vardill* (s) that, in order to take as an heir of English land, the claimant must be not only legitimate by the law of his domicile, but born in lawful wedlock ("ex justis nuptiis procreatus," Co. Litt. 7 b.). It was accordingly decided that the son of parents domiciled in Scotland, born before marriage, but legitimated according to Scotch law *per subsequens matrimonium*, could not inherit land in England. The case of a son born after marriage being good by the *lex domicilii* but invalid by the *lex situs* of the land, is or should be governed by different considerations. The most obvious example is that of the issue of a Colonial marriage with a deceased wife's sister, valid by the law of the domicile of the parties. In the absence of authority it would have seemed that such a marriage would have been accepted as *justæ nuptiæ* by English law; and it has just been shown that for all purposes other than those of heirship it would be so accepted. Nevertheless, such authority as exists is against the right of the child of such a marriage to succeed to English land and as heir (t). *Fenton v. Livingstone* is the only case of those cited which related to a marriage with a deceased wife's sister, the others being instances of *post-nati* claiming to have been legitimated *per subsequens matrimonium*. The House of Lords, sitting as a Scotch Court of ultimate appeal, did undoubtedly decide that the right of the claimant to inherit Scotch land must be decided by the *lex situs*, and not by the law of his domicile; and the case was remitted to the Court of Session to ascertain the Scotch law on the subject, which had been assumed for the purposes of argument. The judgments, however, render it plain that the Court meant the *lex situs* speaking for itself, and not as adopting the *lex domicilii* (u). It seems, therefore, impossible to contend with any hope of success, if

Marriage
valid by *lex*
domicilii—
legitimacy of
offspring.

(r) Hansard's Parl. Deb., June 11, 1883, vol. 260, p. 158.

(s) *Birtwhistle v. Vardill* (1826), 7 Cl. & F. 851. See this case discussed in *Re Goodman's Trusts* (1881), 17 Ch. D. 266, and especially by James, L.J.

(t) *Fenton v. Livingstone* (1859), 3 Macq. 497; *Birtwhistle v. Vardill* (1826), 7 Cl. & F. 851; *Re Don's Estate* (1857), 27 L. J. Ch. 98. Cf. the Acts referred to *supra*.

(u) See especially per Lord Chelmsford, 3 Macq. 497, at p. 559.

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Fenton v. Livingstone is to be regarded as a binding authority, that the child of a marriage with a deceased wife's sister, though legitimate by the *lex domicilii* for all purposes and by the law of England for all purposes save this, can inherit English land as heir.

The tendency of recent cases, however, has been to enlarge the acceptance of the *lex domicilii*, and to confine the doctrine of *Birtwhistle v. Vardill* within the strictest limits. Thus a devise of English land to the children of A has been held to include a child not born in wedlock, but legitimised *per subsequens matrimonium* according to the law of the parents' domicile (*x*). And with regard to personalty, children similarly legitimised are entitled to take, either on intestacy (*y*), or by bequest (*z*). The subject of legitimacy has already been treated in more detail (*a*).

Privilegia.

The effect of *privilegia*, or laws specially passed with reference to one or more individuals, depriving them of the right either of marrying or entering into any other relation permitted to other sane adults, is no doubt to create an artificial incapacity of a particular kind, and for certain purposes. The incapacity, however, being an artificial and not a natural one, cannot demand recognition in other countries; and the law creating it will be imperative only in the tribunals of the sovereign Power by which that law was enacted. The law may direct those Courts to refuse to recognise a marriage contracted in any country by the subject of the *privilegium*, or only to regard as invalid any marriage contracted by him within its territorial jurisdiction. The former has been held to be the proper construction of the Royal Marriage Act (12 Geo. 3, c. 11) (*b*), the judges saying, in answer to a question put to them by the House of Lords, that that statute does not enact an incapacity to contract matrimony within one particular country and district or another, but to contract matrimony generally and in the abstract. It creates an incapacity attaching itself to the person of AB, which he carries with him wherever he goes. The difference between such an enactment and the ordinary Marriage Acts, which require certain consents as necessary preliminaries to a valid marriage in a certain country, has been already pointed out (*c*). British Acts of attainder, on the other hand, though they may possibly render the attainted person incapable of contracting a valid marriage

Acts of
attainder.

(*x*) *In re Grey's Trusts* (1892), 3 Ch. 88.

(*y*) *In re Goodman's Trusts* (1881), 17 Ch. D. 266, disapproving *Boyes v. Bedale* (1863), 1 H. & M. 798.

(*z*) *In re Andros* (1883), 24 Ch. D. 637.

(*a*) *Supra*, p. 115.

(*b*) *The Sussex Peerage Case* (1844), 11 Cl. & F. 85.

(*c*) *Supra*, p. 127; and see *Compton v. Bearcroft* (1769), Bull. N. P. 6th ed. 113; 2 Hagg. Cons. 443, n.; *Ilderton v. Ilderton* (1793), 2 H. Bl. 145.

within the dominions of the Crown, do not claim any extra-territorial recognition as to marriages contracted abroad, nor are such foreign marriages regarded as invalid even by British Courts (d). "It would be a most revolting conclusion to come to," says Erle, C.J., in the case cited, "that the marriage of a man, who was capable of contracting in the land in which he was living, with a woman who was born and brought up in that land, and who might even have been ignorant of her husband's attainder, was invalid, and their children illegitimate, because the man had been attainted before he went abroad. If such were the law, I should not shrink from enforcing it; but I believe that it is not the law of our land, though it is said to be the law of France" (e). The more correct view, indeed, appears to be that a British Act of attainder does not even incapacitate the attainted person from contracting a valid marriage in England, or, at any rate, that it renders such a marriage voidable merely, and not void (f).

On analogous principles, it has been held that where a marriage has been dissolved by the *forum domicilii* and the law of the domicile professes to render the guilty party incapable of re-marriage during the lifetime of the divorced spouse, the artificial incapacity which it professes to create will not be required in an English Court. The marriage must either be dissolved for all purposes or not at all; and the children of a second marriage contracted during the existence of the prohibition are consequently legitimate (g).

It should be observed, however, that in the case cited the second marriage was contracted in England. It would be difficult to contend for the validity of a second marriage in the State whose law imposed the disability, and in a case where the new matrimonial domicile was the same as that of the first or dissolved marriage.

So far as British subjects are concerned, special provision has been made by statute for the validity of marriages abroad according to English forms. By 4 Geo. 4, c. 91, it was enacted and declared that all marriages solemnised by a minister of the Church of England (h) in the chapel or house of any British Ambassador or Minister, or in a chapel or house of any British factory abroad, or within the British lines of any British army

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Marriages
valid by
English
statutes.
Earlier provisions as to
British
legations,
lines, and
factories.

(d) *Kynnauld v. Leslie* (1866), L. R. 1 C. P. 389.

(e) *Kynnauld v. Leslie* (1866), L. R. 1 C. P. 389. *Vide Hobby's Case*, sub nom. *Boreston and Adams*, Noy, 158; 4 Leon. 5; Palm. 19; *Collingwood v. Pace* (1656), 1 Vent. 413; Bridg. 410.

(f) Per Willes, J., in *Kynnauld v. Leslie* (1866), L. R. 1 C. P. 389, 400; *Phillips v. Eyre* (1870), L. R. 6 Q. B. 7.

(g) *Scott v. Att.-Gen.* (1886), L. R. 11 P. D. 128.

(h) See now the Foreign Marriage Act, 1892, briefly considered *infra*.

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abroad, shall be as valid as if duly solemnised in the United Kingdom with the forms (there) required. The statute purports to be declaratory; and, so far as the precincts of British legations are concerned, the legality of such marriages depends (apart from the statute) on the principles of extra-territoriality (*i*). So far as it relates to marriages within the lines of British troops abroad, it is based on the common law, which allowed such marriages when there was hostile occupation of a foreign soil (*k*), and probably also when the occupation was friendly (*l*).

The same doctrine applies to other cases of necessity (*m*).

Ships of war, even in foreign territorial waters, are regarded as integral parts of the dominions of their Sovereign, for marriage as for other purposes. It has been held that the statute 4 Geo. 4, c. 91 applies to cases where the nationality of the husband only was British, and that both his domicile and the nationality of the wife were immaterial (*n*).

But one at least of the contracting parties must be a British subject (*o*); and it would be, perhaps, difficult to support such a marriage in cases where an Englishwoman was married abroad to a foreigner both by nationality and domicile. The question would probably depend upon the view taken of the marriage by the foreign law, being the law of the matrimonial domicile.

The Act of 4 Geo. 4, c. 91, being applicable only to British legations, British lines, and British factories, it was found expedient to pass a wider statute. The Consular Marriage Act, 1849 (12 & 13 Vict. c. 68) was accordingly passed, which legalised all marriages (where both or one of the parties was a British subject) which should be solemnised at the British consulate, according to any forms and ceremonies, after certain prescribed notices. In marriages not according to the rites of the Church of England, certain essential declarations are prescribed as part of the ceremony by s. 9 (*p*). In 1890 the Marriage Act, 1890 (53 & 54 Vict. c. 47) was passed, and in 1891 the Foreign Marriage Act, 1891 (54 & 55 Vict. c. 74); but both these statutes, as well as the 4 Geo. 4, c. 91, and the 12 & 13 Vict. c. 61 (as also the Consular Marriage Act, 1868), were superseded and repealed by the Foreign Marriage Act, 1892, which purports to be a consolidation or code of the British law applicable to the subject. In addition to the Act there are the regulations contained in the

(*i*) *Vide infra*, chap. v. (iii).

(*k*) *Rex v. Inhabitants of Brampton* (1808), 10 East, 282.

(*l*) *Burn v. Farrar* (1819), 2 Hagg. Cons. 369; *The Waldegrave Peerage* (1837), 4 Cl. & Fin. 649, H. L.

(*m*) As in *Lindo v. Belisario* (1795), 1 Hagg. Cons. 216.

(*n*) *Re Wright's Trusts* (1856), 25 L. J. Ch. at p. 631.

(*o*) *Pertreis v. Tondear* (1790), 1 Hagg. Cons. 136.

(*p*) "Consul" under this Act includes "acting-consul," 31 & 32 Vict. c. 61.

Foreign Marriages Orders in Council, made under it in 1892, 1895, and 1903.

The general scheme of the Act is to provide that all marriages celebrated abroad—in British possessions outside the United Kingdom as well as in foreign countries (*q*)—between parties one of whom at least is a British subject before a “marriage officer” in the manner provided by the Act shall be as valid as if duly solemnised in the United Kingdom according to law (*r*). A foreign Court will not necessarily recognise a marriage of this kind on the ground of extritoriality, unless both parties to it are British subjects; but a declaration by a foreign Court that such a marriage is null through non-compliance with the forms of the *lex loci celebrationis* will not prevent an English Court from holding it valid in England if celebrated according to the statute (*s*).

The following may act as “marriage officers”: British ambassadors (*t*) (including ministers and *chargés d'affaires*) (*u*) in the countries to which they are accredited, or persons for the time being performing their duties, or any secretary attached to the embassy who is appointed for the purpose in writing by the ambassador; British consuls (including a consul-general, vice-consul, pro-consul, consular agent) (*x*), governors, high commissioners, residents, and consular or other officers (*y*). Except in the case of ambassadors (*z*), the marriage officer derives his authority from a “warrant” signed by the Secretary of State (*a*). Such a warrant may similarly authorise other persons to act as marriage officers.

Fourteen days' notice of the intended marriage must be given, along with certain particulars (*b*); a fresh notice is necessary if the marriage is not celebrated within three months thereafter (*c*). In addition to the general principles of capacity, consents, if any, required by English law must be given (*d*). (It is to be noted that such consents are those that are required only by English

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The Foreign
Marriage
Act, 1892
(55 & 56
Vict. c. 23).

Marriages
of British
subjects
abroad.

Marriage
officers.

Notice and
consents.

(*q*) s. 11 (2) (*c*).

(*r*) s. 1.

(*s*) *Hay v. Northcote*, [1900] 2 Ch. 262, where Farwell, J., held, following *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67, that a marriage between a Frenchman and an Englishwoman, duly celebrated in France under the Consular Marriage Act, 1849 (replaced by the Foreign Marriage Act, 1892), was valid as regards form in England, though declared invalid as regards form by a French Court. See *infra* the Marriage with Foreigners Act, 1906, which supplements the Act of 1892.

(*t*) s. 11 (2) (*a*).

(*u*) s. 24.

(*x*) s. 24.

(*y*) s. 11 (2) (*b*) (*c*).

(*z*) Foreign Marriages Ord. in Coun., 1892, art. 1.

(*a*) s. 11 (1).

(*b*) s. 2.

(*c*) s. 6.

(*d*) s. 4 (1).

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Celebration.

law—a contrast to the expression “United Kingdom” mentioned in s. 1, thus making English law a prerogative British law for the purposes of the Act.)

The marriage must be celebrated by the marriage officer in his official house (*i.e.*, the house or office at which he usually transacts his business) (*e*), or by some other person in his presence, and in the presence of two or more witnesses (*f*).

Refusal to
celebrate a
marriage.

The marriage is not to be thus celebrated if a marriage by the local law of the foreign country would be valid in England, unless both parties are British subjects, or one is a British subject and the other is not a subject or citizen of the foreign country, or one is a British subject and the other is a citizen or subject of the foreign country, but there are not sufficient facilities for solemnising the marriage in the foreign country in accordance with its law (*g*); and if the woman is a British subject and the man an alien, the marriage officer must be satisfied that the marriage will be valid by the law of the husband's nationality (*h*). Further, the marriage officer may refuse to solemnise a marriage, if contrary to international law or the comity of nations (*i*). In case of refusal, an appeal lies to the Secretary of State (*k*).

Royal
marriages.

The above provisions do not apply to royal marriages (*l*), which are provided for by the Royal Marriages Act, 1772 (*m*).

Form of
ceremony.

There is no prescribed form of ceremony. If the marriage officer himself solemnises the marriage, the parties must make declaration to each other (*n*); if a clergyman or other person does so, in the presence of the marriage officer, any form of religious celebration may be adopted (*o*).

Registration.

Provision is made for the due registration of such marriages (*p*); but registration will give them no greater validity than they would otherwise have.

Marriages
of British
subjects
on his
Majesty's
ships.

Marriages of British subjects on board His Majesty's ships in foreign stations are also recognised by the Act of 1892 (*q*). At least one of the parties must be a British subject. The provisions outlined above also apply here, together with the following. The marriage officer is to be the commanding officer of such rank and of such vessel as the Admiralty instructions for the time being

(*e*) s. 24.

(*f*) s. 8 (2).

(*g*) Foreign Marriages Ord. in Coun., 1892, art. 4.

(*h*) *Ibid.*, art. 5. See now Marriage with Foreigners Act, 1906, *infra*.

(*i*) s. 19.

(*k*) s. 5 (3), s. 19; Ord. in Coun., 1892, art. 4 (2).

(*l*) s. 23.

(*m*) Cf. the *Sussex Peerage Case* (1844), 11 Cl. & Fin. 85, H. L.

(*n*) s. 8 (2). See the Perjury Act, 1911, which has repealed the penal provisions concerning false statements or notices with respect to marriage.

(*o*) *Ibid.*

(*p*) ss. 9, 10, 18.

(*q*) s. 12.

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authorise for the purpose (r). He must satisfy himself that there are not sufficient facilities for the marriage to take place on land at the place where the ship is stationed (s). Three weeks' notice is necessary either to friends and relatives, or in such a public manner as satisfies the commanding officer that as much notice has been given as would be necessary in England, and that the marriage is not clandestine (t). (With regard to the publication of banns on board ship of a marriage to be celebrated in the United Kingdom, see the Naval Marriages Act, 1908.)

By the Naval Marriages Act, 1915 (u), for the period of the war, where one of the parties to an intended marriage was an officer, seaman or marine borne on the books of one of His Majesty's ships and the parties had duly fulfilled all the legal requirements for marriage in any particular place of worship or in any particular district in the United Kingdom, and a certificate was obtained from the commanding officer certifying that the officer, seaman or marine could not be allowed to proceed to such place of worship or district, the marriage might be celebrated in any other building in the United Kingdom in which marriages may be lawfully solemnised or contracted, provided that "where apart from the above provision the marriage could not have been solemnised elsewhere than in a place of worship of a particular denomination, nothing in the said provision shall be construed as authorising the solemnisation of the marriage elsewhere than in such place of worship."

Similar recognition is extended to marriages solemnised within the British lines by a chaplain, or officer, or other person acting under the orders of the commanding officer of a British army serving abroad (x). A British army is presumed to carry with it British law (y). The authority of the commanding officer is not essential; it is sufficient if the person who celebrates it is under his orders (z); and, as already stated above, the occupation of the foreign country need not necessarily be hostile.

Marriages within the lines of a British army serving abroad.

A marriage on a merchant ship on the high seas is valid, unless the law of the country to which the ship belongs regards it as invalid. A marriage on a British merchant vessel appears to depend on the common law.

Marriages on merchant ships.

By special statute any marriage celebrated abroad (either in

Special statutes.

(r) s. 12; Ord. in Coun., 1892, art. 10 (1).

(s) Ord. in Coun., 1892, art. 10 (2).

(t) Ord. in Coun., 1892, art. 10 (3).

(u) 5 Geo. 5, c. 35.

(x) s. 22, which section only declares the existing law.

(y) *R. v. Inhabitants of Brampton* (1808), 10 East, 282, per Lord Ellenborough; and see *supra*.

(z) *The Waldegrave Peerage Case* (1837), 4 Cl. & Fin. 649, H. L.

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The Marriage with
Foreigners
Act, 1906
(6 Ed. 7,
c. 40).

British possessions or in foreign States), and being of doubtful validity, may be validated (a).

The Marriage with Foreigners Act, 1906, supplements the Act of 1892. Its object is to protect from risk British subjects marrying aliens, either in England or abroad, and then finding that though the marriage is valid in England it is not recognised by the other party's personal law. Under this Act a British subject who desires to be married in a foreign country to an alien obtains opportunities of fulfilling the requirements of the foreign law. He may, if resident in the United Kingdom, give notice of the marriage to the superintendent registrar of the district in which he resides, or, if resident abroad, to the marriage officer under the Act of 1892, or to the British consul. The registrar or officer, after due notices have been given and the conditions prescribed by the schedule have been fulfilled, may give a certificate that no legal impediment has been shown to exist, unless the certificate is forbidden by a person whose consent to the marriage is necessary, or a *caveat* has been lodged which has not been withdrawn or overruled. Penalties are imposed for false oaths or notices on persons forbidding a marriage. Persons entering a *caveat* on frivolous grounds are liable to compensate the applicant for the damage thereby caused (b).

*Ex post
facto
legislation.*

It is plain that the validity given to marriages abroad by statutes such as these cannot claim recognition in any Courts other than those of the Legislature which passed the statutes, otherwise than by treaty. Such recognition may sometimes be given to them in cases where the matrimonial domicile is British as well as the nationality of the parties, but it cannot be relied upon. The province of the *lex domicilii* is the "essentials" of the marriage, and has nothing to do, in strictness, with the forms of celebration.

The Greek Marriages Act, 1884 (47 & 48 Vict. c. 20), is an almost unique instance of validity being given to marriages not contracted according to local forms, by *ex post facto* legislation. The retrospective law being the *lex loci celebrationis*, it may fairly be argued that such cases ought to be regarded by all Courts as if the local law had existed at the time; but it is impossible to predict the view which might be taken of this legislation by a foreign tribunal (c).

Colonial
marriages.

Marriages may be celebrated in a British possession or pro-

(a) There are many examples of such procedure; a recent one is the Marriages in Japan (Validity) Act, 1912 (2 & 3 Geo. 5, c. 15).

(b) s. 1 (2) of this Act has been repealed by the Perjury Act, 1911 (1 & 2 Geo. 5, c. 6).

(c) So far as the limits of the British Empire are concerned, retrospective legislation as to the validity of marriages is given a wider recognition by the Colonial Marriages Validity Act, 1865 (28 & 29 Vict. c. 64).

tectorate under the Foreign Marriage Act, 1892 (*d*), and for purposes of English law such marriages are regarded as foreign marriages.

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Apart from this provision, marriages solemnised in other parts of the United Kingdom or in the British dominions will be valid in England, if the local law as to celebration be observed, if the parties had by the law of their domicile the capacity to intermarry, and, for purposes of the law of inheritance, if they could have legally intermarried in England.

By the Colonial Marriages Act, 1865 (28 & 29 Vict. c. 64), laws made or to be made in British possessions abroad to establish the validity of marriages there contracted are to have the same effect throughout the British dominions, as in that part in which the marriage was contracted, if at the time of the marriage both parties possessed the necessary capacity by English law.

By the Colonial Marriages (Deceased Wife's Sister) Act, 1906 (6 Edw. 7, c. 30), the marriage of a man with his deceased wife's sister either before or after the date of the Act, if both parties were at the time of the marriage domiciled in a colony in which such a marriage was then lawful, is validated for all purposes, including the right of succession to real estate and to honours and dignities within the United Kingdom, unless either party has subsequently, during the life of the other, but before the passing of the Act, lawfully married another (*e*).

This Act is substantially superseded by the Deceased Wife's Sister Marriage Act, 1907 (*g*), which declared marriages between a man and the sister—whether of whole or half blood—of his deceased wife valid. The statute applies irrespectively of the country where the marriage was celebrated, and also applies, with certain exceptions, as to existing rights and interests, to marriages contracted before its passing (28th August, 1907).

(iii) DISSOLUTION OF THE MARRIAGE.

Under this head it is necessary to consider, in the first place, what divorces by foreign tribunals (*h*) will be recognised as valid by English law, and, secondly, what marriages the English Court will assume jurisdiction to dissolve.

(*d*) s. 11 (2).

(*e*) This Act abolished the effect, so far as the Colonies were concerned, of *Birtwhistle v. Vardill* (1840), 7 Cl. & Fin. 895, H. L.

(*g*) 7 Edw. 7, c. 47.

(*h*) It will be remembered that from the point of view of private international law, Scotland and Ireland are regarded as foreign countries; cf. *Yelverton v. Yelverton* (1859), 1 Sw. & Tr. 574. So far as Ireland was concerned, there was no tribunal there competent to pronounce a decree of dissolution of marriage, for which purpose an Act of Parliament was necessary; cf. *Malone's Divorce (Valid Action) Bill*, [1905] A. C. 314; *Grimshaw's Divorce (Validation) Bill*, 1907, 51 Sol. Jo. 529, H. L. Now that Southern Ireland has acquired Dominion

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Foreign divorce has no effect on an English marriage, at any rate if the domicile of the parties is English.

(a) *Recognition by English Courts of Foreign Divorce.*—On the first point, the English law is frequently loosely expressed by saying that an English marriage cannot be dissolved by a foreign Court or authority; and that any decree purporting to effect such dissolution must be regarded as a nullity (i). *Lolley's Case* (k) is the authority commonly cited in support of this proposition, and, as far as regards a marriage celebrated in England in which the domicile of the husband remains English, it is undoubtedly correct. Unless the parties are *bona fide* domiciled under the foreign jurisdiction which assumes to dissolve their marriage at the time of such attempted dissolution, it is quite clear that the English Courts will not recognise the validity of any such divorce (l). *Lolley's Case*, in which a man who was convicted of bigamy for having married again in England after a Scotch divorce from an English marriage, was followed in *Conway v. Beazley* (m), expressly upon the ground that, so long as the parties remain domiciled in England, no Scotch divorce of an English marriage can be recognised by English law. Dr. Lushington in that case expressed a strong opinion that the principle which denied recognition to such divorces had no application to cases where the parties were domiciled at the time in the country whose tribunals assumed to divorce them. So, in *Dolphin v. Robins* (n), a Scotch divorce of an English marriage, where the parties were not domiciled in Scotland, but had gone there for a time to found a jurisdiction according to Scotch law, was held invalid (o). And in the more recent case of *Shaw v. Attorney-General* (p), where a woman had left her English husband in England, and, after a residence of two or three years in America, obtained a divorce there, her husband's domicile continuing English, her second marriage in America was held invalid. Hence residence which falls short of a properly constituted

status, the Dail Eirann would appear to be the competent tribunal to pronounce a decree of dissolution by a private Act of Parliament. The same procedure would appear to be open in Northern Ireland, where, however, one would have expected a statute for the purpose similar to the English Act. On the other hand, in Scotland a divorce *à vinculo* and a *mensa et thoro* can be granted on grounds which might not necessarily suffice in England for the same purpose.

(i) See, *e.g.*, the judgment of Kindersley, V.-C., in *Wilson's Trusts* (1865), L. R. 1 Eq. 247.

(k) (1812), 1 Russ. & Ry. 237.

(l) *Le Mesurier v. Le Mesurier*, [1895] A. C. 517, where several earlier important cases are discussed. The decision here was pronounced by the Privy Council and not by the House of Lords, but it has been affirmed and followed by the Court of Appeal in the recent case *Bater v. Bater*, [1906] P. 209. See further *Ogden v. Ogden*, [1908] P. 46, C. A., and *Re Stirling, Stirling v. Stirling*, [1908] 2 Ch. 344.

(m) (1831), 3 Hagg. Eccl. Rep. 639.

(n) (1859), 7 H. L. C. 390; *Pitt v. Pitt* (1864), 4 Macq. 627.

(o) *Shaw v. Gould* (1868), L. R. 3 H. L. 55; *Tollemache v. Tollemache* (1859), 1 S. & T. 557; 28 L. J. P. & M. 2.

(p) (1870), L. R. 2 P. & D. 156.

domicil will not be sufficient (*q*), and more obviously so if the residence is not even a *bona fide* residence, but has been taken up with the object of obtaining a divorce (*r*). Of course, a foreign Court may, notwithstanding the want of domicil, justly claim the power to dissolve the marriages of persons residing within the limits of their jurisdiction; and an English Court would recognise the validity of decrees within those limits (*s*), but not outside those limits—in which case it would regard as bigamy a second marriage of a British subject after having been so divorced (*t*).

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In none of the cases cited in the preceding paragraph had it been decided that an English marriage cannot be dissolved by a foreign tribunal where the parties at the time of the divorce are *bona fide* domiciled in that foreign State. Unquestionably, however, the decision of Lord Brougham in *McCarthy v. De Caix* (*a*) must be regarded as intending to lay down such a rule. It must be remembered, however, that this case was decided in 1831, when divorce *à vinculo* was not recognised in England by the Ecclesiastical Courts; and the difficulty of admitting the power of a foreign tribunal to dissolve an English marriage was therefore greater than at present. Since the judgment of the House of Lords in *Harvey v. Farnie* (*b*), this case can no longer be regarded as law. Even before the judgment referred to, *McCarthy v. De Caix* had been treated as open to question. *Warrender v. Warrender* (*c*) was, it is true, a decision on Scotch law, but the House of Lords there clearly held that it was competent for the Scotch Courts to decree a divorce between parties domiciled in Scotland whose marriage had been celebrated in England. The same principle had been adopted both in Irish (*d*) and Scotch Courts (*e*). The existing England law on the subject was perhaps best summarised by the Judge-Ordinary Lord Penzance in *Shaw v. Attorney-General* (*f*) in 1870. "First," he says, "*Lolley's Case* has never been over-ruled. Secondly, in no case has a foreign divorce been held to invalidate an English marriage between English subjects where the parties

Divorce by
the *forum*
domicilii.

(*q*) *Le Mesurier v. Le Mesurier*, *supra*.

(*r*) Cf. *Bonaparte v. Bonaparte*, [1892] P. 402. *Lolley's Case* (1812), 1 Russ. & Ry. 237, is often cited as an authority on this point, but *Bater v. Bater*, [1906] P. 209, C. A., contains a much weightier pronouncement. See also the more recent case, *Cass v. Cass* (*otherwise Pfaff*), [1910] 26 T. L. R. 305.

(*s*) *Green v. Green*, [1893] P. 89.

(*t*) Cf. *The King v. Earl Russell*, [1901] A. C. 446.

(*a*) (1831), 2 R. & M. 614.

(*b*) (1882), 6 P. D. 35; S. C. on appeal, 8 App. Cas. 43, 52.

(*c*) (1835), 2 Cl. & F. 529.

(*d*) *Maghee v. McAllister* (1853), 3 Ir. Ch. 604.

(*e*) *Geils v. Geils*, 1 Macq. 255; 13 Court Sess. Cas. (2nd Series), 321.

(*f*) (1870), L. R. 2 P. & D. 156, 161. Cf. the language of Lord Westbury in *Shaw v. Gould* (1868), L. R. 3 H. L. 80.

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Foreign
divorce of
English
marriage by
the *forum
domicilii*—
now recog-
nised.

were not domiciled in the country by whose tribunals the divorce was granted. Whether, if so domiciled, the English Courts would recognise and act upon such a divorce, appears to be a question not wholly free from doubt, but the better opinion seems to be that they would do so if the divorce be for a ground of divorce recognised as such in this country, and the foreign country be not resorted to for the collusive purpose of calling in the aid of its tribunals." In the case of *Birt v. Boutinez* (g), before the Judge-Ordinary in 1868, the point did not really arise, as the parties had gone through the ceremony of marriage twice, once in Scotland and afterwards in Belgium (where the husband was domiciled), and the Belgian divorce did not purport to do more than dissolve the Belgian marriage, which according to English law had created no new status between the parties. Nor was the principle at all involved in the case of *Colliss v. Hector* (h), which only decided that a Turkish divorce had no operation to interfere with the validity of an English marriage settlement between a domiciled Turk and an English lady, though it would have had that effect according to the law of Turkey. The judgment of Vice-Chancellor Hall in that case by no means involved the assertion that the marriage had not been effectually dissolved, but proceeded on the ground that the settlement was an English contract, to be expounded and dealt with according to English law. In the older case of *Ryan v. Ryan* (i), the validity of a Danish divorce of an English marriage was admitted, the husband being domiciled in Denmark, but only for the purpose of granting administration to the widow of a second marriage, no opinion being expressed as to the general principle. The singular case of separation by vows of chastity, taken by permission of the Pope, arose in *Connelly v. Connelly* (k), and was regarded as a species of consensual divorce, which the Court was evidently inclined to consider must be governed as to its effect and permanence by the law of the domicile of the parties at the time of the separation, and the allegation of the respondent was ordered to be amended that the facts relating to this question might be ascertained.

Jurisdiction
of the *forum
domicilii* now
recognised.

The English law on this subject having been left in this uncertain state, the whole question came before the Courts in 1880 in the case *Harvey v. Farnie* (l), in which all the existing authorities were reviewed. The result of that case was to

(g) (1868), L. R. 1 P. & D. 487

(h) (1875), L. R. 19 Eq. 334.

(i) (1816), 2 Phill. Eccl. 332.

(k) (1851), 7 Moo. P. C. 438.

(l) (1880), 5 P. D. 153; S. C. 6 P. D. 35; 6 App. Cas. 43. Followed in *Turner v. Thompson* (1888), 13 P. D. 37.

establish the general principle that the *forum* of the matrimonial domicile is competent to dissolve a marriage contracted in England, even for a cause (such as adultery of the husband) which is insufficient in itself to support a claim for divorce in England. The decision is put by Lord Selborne upon the ground that the marriage is contracted with a view to the matrimonial domicile, and that the wife becomes thereby subject to her husband's law. It would seem to follow that the principle of *Harvey v. Farnie* would be equally applicable to cases where the matrimonial domicile was changed after marriage, and even, therefore, to the case of a marriage in England to a domiciled Englishman, where a foreign domicile was afterwards acquired, and a divorce obtained in the country of that domicile (*m*). The case suggested by James, L.J., of an English husband going to a foreign country for the sole purpose of domiciling himself where a divorce could be more easily obtained seems (strictly speaking) to be rather an illustration of the difficulty of deciding when a new domicile is acquired. This must be always a question of fact, and no Court would hold that a mere temporary transference of the matrimonial home for the sake of obtaining a divorce could bring about a change of domicile at all. On the other hand, if other circumstances established the *animus manendi* beyond doubt, it is difficult to see why one of the original motives should vitiate the effect of facts (*n*). Further, the Courts in this country will recognise the extra-territorial validity of any decree of divorce, which is held valid by the Courts of the country of the domicile, even if the latter had not themselves pronounced the decree. Thus in a recent case, *Armitage v. Attorney-General* (*o*), A married an Englishwoman in England, without having abandoned his domicile of origin in New York State. She obtained a divorce from him in South Dakota (where residence for a certain period, and not domicile, gave jurisdiction to pronounce a decree), on the ground of desertion, which is insufficient to found an absolute divorce according to the law of New York. Evidence having been given that the Court of New York, *i.e.* the Court of the husband's domicile, would recognise the validity of this decree, Gorell Barnes, P., held that it must also be regarded as valid in England. But a decree of dissolution pronounced by a Court

(*m*) See per Lord Blackburn, 8 App. Cas. at pp. 60, 61; per James, L.J., 6 P. D. 46, 47; per Cotton, L.J., *ibid.* 49.

(*n*) See, on this point, the finding as to domicile, and the language generally, of Hannen, J., in *Briggs v. Briggs* (1880), 5 P. D. 163, 165, and for an example see *Bonaparte v. Bonaparte*, [1892] P. 202. Cf. further as to the recognition in England of a divorce granted by the Court of the country of the domicile, *Bater v. Bater*, [1906] P. 209, C. A.

(*o*) (*Gillig cited*), *Gillig v. Gillig*, [1906] P. 135.

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which is not the *forum domicilii* of the married pair is of no effect. Thus an American Court has no power to dissolve the marriage of a domiciled Englishman, though the wife's domicil of origin was American (*p*).

Locus delicti. If the *forum* be the *forum domicilii*, it would appear to be immaterial that the *locus delicti* should have been within another jurisdiction; and it has been said by Lord Lyndhurst that the law makes no distinction in respect of the place of the commission of the offence (*q*). And Story states the American doctrine to be, that the law of the place of the actual *bona fide* domicil gives jurisdiction to the proper Courts to decree a divorce for any cause allowed by the local law, without any reference to the law of the place of the original marriage, or the place where the offence for which the divorce is allowed was committed (*r*). Notwithstanding the case of *Niboyet v. Niboyet* (*s*), however, it will presently be shown that the English Courts have definitely accepted the same principle, so far as decrees for divorce or annulment of marriage are concerned; though temporary residence is regarded as sufficient to give jurisdiction so far as judicial separation, alimony, and custody of children are concerned. And when a divorce has once been pronounced by the Court of the matrimonial domicil, the English Courts will not re-open the question, or try the validity of the decree, unless it appears that the proceedings were contrary to natural justice, as, for example, if they were without notice to the respondent (*t*). Merely irregular proceedings, not resulting in substantial injustice according to English views, will not invalidate a decree, when pronounced by a competent Court acting within its jurisdiction (*u*).

Divorce—
must not
impose a
disability.

The right of the *forum domicilii*, however, to dissolve a marriage does not carry with it the right to impose disabilities. The marriage must either be dissolved for all purposes, or not at all; and a personal disability to remarry will not follow the person into another jurisdiction—at any rate when such person

(*p*) *Green v. Green*, [1893] P. 89. The principle that the *forum* must be that of the matrimonial domicil was assumed in the case of *The King v. Earl Russell*, [1901] A. C. 446 (bigamy).

(*q*) *Warrender v. Warrender* (1835), 2 Cl. & F. at p. 562.

(*r*) Story, *Conflict of Laws*, § 230 a.

(*s*) (1878), L. R. 4 P. D. 1. *Vide infra*, p. 159.

(*t*) *Pemberton v. Hughes*, [1899] 1 Ch. 781; *Vanquelin v. Bouard* (1863), 33 L. J. C. P. 78; *Shaw v. Att.-Gen.* (1870), L. R. 2 P. & D. 156. See *infra*, Part IV. chap xi. on foreign judgments generally.

(*u*) *Pemberton v. Hughes*, [1899] 1 Ch. 781; C. A. Cf. the more recent case, *Scarpetta v. Lowenfeld* (1911), 27 T. L. R. 509, where A. T. Lawrence, J., held that the Court will not refuse to enforce a judgment obtained in an Italian Court simply because by Italian law neither of the litigants can be called as a witness on his own behalf. The exclusion of such evidence cannot be said to be contrary to substantial justice within the meaning of the rule laid down by Lindley, M.R., in *Pemberton v. Hughes*, 1 Ch. at p. 790.

removes with an intention of changing his domicile (*x*). But if the tribunal which dissolves the marriage forbids the remarriage of *either* of the spouses within a fixed period after the date of the decree, a marriage contracted by either of them within that period, even in another country, will be invalid (*y*). The distinction appears to be, that an attempt to dissolve the marriage and at the same time impose a penal and personal disability on the guilty party is ineffectual, but that the Court which has jurisdiction to dissolve the marriage is competent to fix a time from and after which such dissolution shall be regarded as complete.

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English Courts do not regard foreign decrees of nullity of marriage on the same footing as those of divorce; they are not necessarily considered to have binding force outside the jurisdiction of the Court that pronounced them. In *Sinclair v. Sinclair* (*z*), Lord Stowell said: "The validity of marriage, however, must depend in a great degree on the local regulations of the country where it is celebrated. A sentence of nullity of marriage, therefore, in the country where it was solemnised would carry with it great authority in this country; but I am not prepared to say that a judgment of a third country on the validity of a marriage, not within its territories nor had between subjects of that country, would be universally binding. For instance, the marriage alleged by the husband is a French marriage [*i.e.* a marriage celebrated in France]. A French judgment on that marriage would have been of considerable weight; but it does not follow that the judgment of a Court at Brussels on a marriage in France would have had the same authority, must less on a marriage celebrated here in England" (*a*).

Foreign
decrees of
nullity.

A decree of a foreign Court declaring the nullity of a marriage, by reason of the physical incapacity of one of the parties, will be probably recognised in England, if the marriage was celebrated in the foreign country or if the parties were domiciled there (*b*).

(*b*) *Jurisdiction of the English Court to dissolve Foreign Marriages*.—The second question which arises with reference to the subject of divorce is, under what circumstances the English Court will assume jurisdiction to dissolve a marriage, not contracted in England, and whether it will in all cases dissolve a

(*x*) *Scott v. Att.-Gen.* (1886), 11 P. D. 123.

(*y*) *Warter v. Warter* (1890), in P. D., June 25 (see *Times* of that date); 59 L. J. Prob. 87.

(*z*) (1798), 1 Hag. Cons. 297.

(*a*) Cf. *Ogden v. Ogden*, [1908] P. 46, C. A., and *Stathatos v. Stathatos*, [1913] P. 46.

(*b*) *Ogden v. Ogden*, at p. 80, per Gorell Barnes, P. Cf. *Turner v. Thompson* (1888), 13 P. D. 37.

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English
domicil of
husband
sufficient and
necessary to
found juris-
diction.

marriage which has been so contracted, without regard to the matrimonial domicil at the time its interference is invoked. It may be now taken as established that for this purpose it is necessary that the *domicil* of the husband should be English when the relief is sought, with the single exception of a suit by a wife deserted or compelled to live apart from her husband, and up to that time domiciled in England (c). The English Court may assume jurisdiction to dissolve a marriage that was celebrated in England, on the petition of a wife, a domiciled Englishwoman, who was deserted by her husband, a foreign subject and domiciled abroad. In *Stathatos v. Stathatos*, [1913] P. 46; 29 T. L. R. 54, where a husband, a Greek subject domiciled in Greece, married an Englishwoman in England, and afterwards deserted her and obtained a decree of nullity from a Greek Court, on the ground that the marriage had not been solemnised conformably to the rites of the Greek Church, in that no priest of that Church was present at the ceremony as required by Greek law. After this he married another woman in Greece. The petitioner thereupon filed a petition for divorce on the ground of the respondent's desertion and adultery. *Held*, that the Court had jurisdiction to grant the relief claimed, since the respondent, having gone abroad and taken adverse advantage of his own domicil, the petitioner had reverted to her English domicil. Thus the dictum in *Ogden v. Ogden*, *supra*, has been confirmed by Mr. Justice Bargrave Deane, who, however, suggested that his decision ought not necessarily to be regarded as a precedent. But, in similar circumstances, in a subsequent case, *De Montaigu v. De Montaigu* [1913] P. 154, Sir Samuel Evans, P., held that he had jurisdiction, and unhesitatingly granted a decree of dissolution to the wife who, he declared, would otherwise have remained in an intolerable situation. The petitioner, an Englishwoman, married at Rugby the son of a French marquis, who afterwards obtained a decree of nullity in France. The learned President, by his decision, regarded the deserted wife as having a domicil in her own country, and showed himself on the side of common sense and equity, by refusing to adopt a too formal and rigid application of a legal theory. "The Court does not now pronounce a decree of dissolution when the parties are not domiciled in this country, except in favour of a wife deserted by her husband, or whose husband has so conducted himself that she is justified in living apart from him, and who, up to the time when she was deserted or began to be so (justified), was domiciled with her husband in this country" (d). It would seem that under such

(c) *Le Mesurier v. Le Mesurier*, [1895] App. Cas. 517, overruling *Niboyet v. Niboyet* (1878), 4 P. D. 1, and cf. *Armytage v. Armytage*, [1898] P. 178.

(d) Per Barnes, J., in *Armytage v. Armytage*, [1898] P. 178, at p. 185.

circumstances the wife would retain her domicile here (e), the matrimonial home being permanently broken up; but the jurisdiction is also justified in the case cited on the ground that in order to meet the injustice which might have been done by compelling a wife to follow her husband from country to country, he cannot be allowed to assert for the purposes of the suit, that he has ceased to be domiciled here.

In *Riera v. Riera* (f) the wife, who before the marriage was domiciled in England, where the marriage took place, petitioned for a judicial separation on the ground of the alleged adultery of her husband, a Spaniard. The husband entered an appearance under protest, and subsequently filed an act on petition. On the wife applying to strike out the act, it was held by Bargrave Deane, J., that the petition and act on petition should be tried together on oral evidence and an answer be filed by the husband.

In *Thiele v. Thiele*, 150 L. T. Jo. 387 (1920), a German subject who was interned in 1914 was repatriated against his will to Germany in 1919. He had married an Englishwoman in 1908, and at the time of the marriage and of the acts of cruelty and adultery alleged against him in a suit for divorce had acquired and still retained an English domicile. Upon proof that no deportation order had been made and that he had expressed the hope to return to this country shortly, it was held that the Court had jurisdiction and, the offences having been proved, that the petitioner was entitled to a decree.

It is to be noted that nothing less than a real and genuine domicile, as recognised by English law, will suffice. In the absence of this the parties cannot by expressly or impliedly consenting to submit to the English Court endow it with the necessary jurisdiction (ff). Submission of the parties to the English Court.

It may be useful here to examine the earlier cases. In *Brodie v. Brodie* (g) the marriage was celebrated in Tasmania, and the petitioner, who was the husband, had acquired an Australian domicile. It was alleged on his behalf that he had since gained a new domicile in England, and the full Court regarded it as un-

(e) Cf. for this contention the American case of *Bonati v. Welsh* (1861), 24 New York C. A. 157, cited and commented on by Lindley, M.R., in *De Nichols v. Curlier*, [1898] 2 Ch. 60, 65.

(f) 112 L. T. 223 (1914).

(ff) Cf. *Armitage v. Att.-Gen.* (Gillig cited), *Gillig v. Gillig*, [1906] P. 135, per Gorell Barnes, P., at p. 140; *Le Mesurier v. Le Mesurier*, [1895] A. C. 517. See, further, *Malone's Divorce (Valid Action) Bill*, [1905] A. C. 314, where an Act of Parliament was especially passed to remove the doubts of the validity of the divorce of a domiciled Irishman granted by the English Court at a time when it was supposed competent for the Court to do so on the parties' submission to its jurisdiction. As to such assumption of jurisdiction, the above-mentioned case of *Armitage v. Att.-Gen.* overrules *Bond v. Bond* (1860), 2 Sw. & Tr. 93; *Zycklinski v. Zycklinski* (1862), 2 Sw. & Tr. 420; *Callwell v. Callwell* (1860), 3 Sw. & Tr. 259.

(g) (1861), 2 Sw. & Tr. 257; 30 L. J. P. & M. 185.

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questionable that, if this were established, they would have jurisdiction to dissolve the marriage. Some evidence of the change of domicile was given, and the Court eventually came to the conclusion that the petitioner was "*bona fide* resident" in England, so as to give them the jurisdiction contended for. A distinction was drawn in this case between such "*bona fide* residence" and strict domicile, the Court remarking that they said nothing as to what the effect of the evidence might have been in a testamentary suit, but that they thought it had been sufficiently established that the petitioner was *bona fide* resident in England to entitle him to a decree. For the proposition, however, that something less than domicile is sufficient to give the English Courts jurisdiction to dissolve marriages, or for any other purpose connected with the *lex domicilii*, there was not until *Niboyet v. Niboyet* (*infra*) any English authority of weight (*h*), unless some expressions which fell from the Judge-Ordinary in *Yelverton v. Yelverton* (*i*) be relied on, and the decisions of the English Courts as to the validity of Scotch divorces founded on the theory of transient residence are directly opposed to such a principle. In *Manning v. Manning* (*k*), alluding to this very case, Lord Penzance said: "I shall forbear to discuss the questions whether there can or ought to be two sorts of domicile; whether a *bona fide* residence alone can in any sense be called a domicile, and whether the mere fact of residence ought or ought not to be sufficient to entitle a party to sue in this Court. I will remark, in passing, that when the case has been reversed, and the Courts of this country have had to consider how far persons who are domiciled Englishmen shall be bound by the decree of a foreign Matrimonial Court, the strong tendency has been to repudiate the power of the foreign Court under such circumstances to dissolve an English marriage. It would be unfortunate if an opposite course should be followed by the Courts of this country, when they are determining to what extent they will entertain the matrimonial suits of foreigners." Lord Penzance was able to come to the conclusion in this case that there was not even the *bona fide* residence which had been held to be sufficient in *Brodie v. Brodie* (*l*), and dismissed the petition accordingly, so that no direct decision as to the soundness of the distinction was arrived

English
domicil of
husband
necessary.

(*h*) It is obvious that such cases as *Warter v. Warter* (1890), 59 L. J. Prob. 87, where the Court recognises the validity of a divorce pronounced by an Indian Court under the authority of an imperial statute, having nothing to do with the principle. By the Indian Divorce Act, 1869, jurisdiction in divorce is given "where the petitioner professes the Christian religion, and resides in India at the time of presenting the petition."

(*i*) (1859), 1 Sw. & Tr. 574; see also *Burton v. Burton* (1873), 21 W. R. 648, and *infra*, p. 151.

(*k*) (1871), L. R. 2 P. & D. 223.

(*l*) (1861), 2 Sw. & Tr. 259; 30 L. J. P. & M. 185.

at, but in the subsequent case of *Wilson v. Wilson* (m) the same judge expressed his opinion still more strongly on the subject. "Whether any residence in this country short of domicile, using the word in its ordinary sense, will give the Court jurisdiction over parties whose domicile is elsewhere, is a question upon which the authorities are not consistent. It is the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the Courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country, and strangers in another. . . . It is not, however, necessary for me to decide on this occasion whether mere residence, short of domicile in this country, is sufficient to found the jurisdiction of this Court, because I have arrived at the conclusion that the petitioner was, at the commencement of this suit, domiciled in this country." In *Burton v. Burton* (n), the petition of the husband was dismissed on the ground that he was not even *bona fide* resident in England, just as in *Manning v. Manning* (o), and it was therefore not necessary to decide whether any residence short of domicile would be sufficient to found the jurisdiction. It is true that the Judge-Ordinary (Sir J. Hannen) is reported in that case as saying that the jurisdiction would not attach until the husband had taken up his residence in England, but this cannot be taken as an authority by implication for the theory that residence not amounting to domicile would be sufficient, in such cases. It may be mentioned that the contrary has, in fact, been held by the Supreme Court of Melbourne (p), after a careful review of most of the English cases, and the *dicta* of Lord Penzance in *Wilson v. Wilson*, to which attention has just been called, render it improbable that the theory suggested in *Burton v. Burton* (q) will be eventually established. It is quite clear, at any rate, that English domicile will be regarded as sufficient to confer jurisdiction (r), and it has been expressly decided in an

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Domicil
necessary
and sufficient
to found
jurisdiction
for divorce;

(m) (1872), L. R. 2 P. & D. 435, 441.

(n) (1873), 21 W. R. 648.

(o) (1871), L. R. 2 P. & D. 223.

(p) *Duggan v. Duggan* (1877), L. T. 152.(q) (1873), 21 W. R. 648; see *Firebrace v. Firebrace* (1878), 26 W. R. 617; *Deck v. Deck* (1860), 2 Sw. & Tr. 90; *Bond v. Bond* (1860), 2 Sw. & Tr. 93.(r) *Ratcliff v. Ratcliff* (1859), 29 L. J. P. & M. 171.

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Irish case (s) that domicile without residence in fact will do for all such purposes. In *Tollemache v. Tollemache* (t), the Court decreed, at the prayer of the husband, a dissolution of a marriage contracted first in Scotland and afterwards in England. After the marriage the parties principally cohabited in Scotland, and the wife contended that a Scotch decree of divorce already made was valid, and that the Court had not jurisdiction. It was found, however, that the husband still retained his domicile of origin, which was English, and the Court decreed a divorce as prayed, holding that they could not recognise a Scotch divorce of a domiciled Englishman.

but this
essential has
been dis-
penssed with.

It being therefore established that the English Court will assume jurisdiction to dissolve a marriage, whether celebrated abroad or in England, if the matrimonial domicile at the time of the petition is English, it remains to notice more particularly the cases in which it has done so where this condition has not been complied with.

Jurisdiction
without
domicil.

The case of *Niboyet v. Niboyet* (u) is in many respects the most remarkable of these instances; and if the decision in that case is to be followed generally, without reference to its peculiar facts, it is not the least important in its logical consequences. The marriage in *Niboyet v. Niboyet* had been contracted at Gibraltar between a Frenchman and an Englishwoman. The husband came to England (with his wife) as a consul for France, and therefore retained his French domicile of origin. The wife sued in the English Court for divorce, on the ground of adultery and cruelty in England; and the Court of Appeal, reversing the decision of Sir Robert Phillimore in the Court below, held that there was jurisdiction to entertain the suit. Lord Justice Brett (later Lord Esher, M.R.) dissented from the rest of the Court, James and Cotton, L.JJ.; so that the weight of authority was at least equally divided, and it is unfortunate that the case was not taken to the House of Lords. The ground of the decision of the majority appears to be "that the matrimonial home is English" (per James, L.J., at p. 9), and that the respondent was "resident in this country, not casually, but for several years" (per Cotton, L.J., at p. 21). Reading these judgments with that of Brett, L.J., who took the opposite view, and with the summary of the cases by Sir Robert Phillimore in the Court below (x), it is difficult to resist the conclusion that the learned judges whose opinions prevailed were, in truth, more unwilling to admit that a French consul retained his domicile of origin than anxious to

(s) *Gillis v. Gillis* (1874), 8 Ir. R. Eq. 597.

(t) (1859), 1 Sw. & Tr. 557.

(u) (1878), 4 P. D. 1.

(x) 3 P. D. 52, citing *Le Sueur v. Le Sueur* (1876), 1 P. D. 139.

assert jurisdiction irrespective of domicile. It was not contested in the cause, and had been expressly affirmed by Sir R. Phillimore below, that the consular office of the respondent "incapacitated him from acquiring a domicile in this country" (y).

There is, no doubt, something pedantic and even irritating about such a rule; but if the rule is not disputed, its consequences must be accepted without evasion. Domicil is, or ought to be, the legal conception of residence (z); and if the respondent in *Niboyet v. Niboyet* retained his French domicile, he did so for all purposes. The law had no business to regard him as resident in England at all. To admit that his "residence" in England, *qua* consul, could not be domicile, and then to attribute to that "residence" all the consequences which domicile usually carries with it, was an essentially "insular" mode of recognising the existence of international law. It is not surprising to find Lord Selborne, in a later case (a), speaking of *Niboyet v. Niboyet* as follows: "Now, if that case was well decided, it is certainly not an authority in the appellants' favour. . . . Whether another country—the country of those parties (France I think)—would have recognised that decision we need not at present inquire." Lord Blackburn, in the same case, expressly guarded himself against expressing any approval of *Niboyet v. Niboyet* (b); whilst even Cotton, L.J. (one of the Lords Justices responsible for the judgment), appears afterwards to have felt the difficulty of harmonising it with private international law (c). It is, of course, clear that, if an English statute expressly directs an English Court to disregard the rules of private international law, the Court must obey. But, "unless there be definite express terms to the contrary, a statute is to be interpreted as applicable and as intended to apply only to matters within the jurisdiction of the Legislature by which it is enacted" (d).

There can be little doubt that the judgment of the majority of the Court in *Niboyet v. Niboyet* is at variance with the general tenor of authority up to the date of that decision (e).

(y) 3 P. D. at p. 59; *supra*, p. 148.

(z) Cf. *supra*, p. 77.

(a) *Harvey v. Farnie* (1880), 8 App. Cas. 55, 56.

(b) At p. 60 of 8 App. Cas.: "There was a difference of opinion in that case, and I wish to express no opinion upon it one way or the other."

(c) "It may be said that our decision in *Niboyet v. Niboyet* was in some way at variance with what we are laying down in this case. . . . The decision . . . turned entirely upon the construction of an English Act of Parliament; and [we] said, whatever might have been the consequences independently of those words, this Act of Parliament gives to us, an English Court, jurisdiction in the matter, and says what is to be the consequence if certain facts are proved in a suit and brought before us under the Act. That was the *ratio decidendi* in that case": per Cotton, L.J., in *Harvey v. Farnie* (1880), 6 P. D. at pp. 50, 51.

(d) Per Brett, L.J., 4 P. D. at p. 20.

(e) In a later case, *D'Etchegoyen v. D'Etchegoyen* (1888), 13 P. D. 132,

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The case of *Niboyet v. Niboyet* was subsequently expressly dissented from by the Judicial Committee of the Privy Council in *Le Mesurier v. Le Mesurier* (f), and may be now regarded as overruled. The present doctrine of the Courts in England is stated by Barnes, J., in *Armytage v. Armytage* (g), and will be found summarised above.

It remains to consider some other cases, of even less authority, in which jurisdiction without domicile has been assumed. In *Deck v. Deck* (h), the marriage was an English one, but the husband had since its celebration acquired an American domicile, where he committed adultery. The Court held that it had jurisdiction, and made the decree asked for by the wife, resting their decision on the two grounds that the words of the statute giving them jurisdiction to dissolve a marriage at the instance of the wife in such cases (20 & 21 Vict. c. 85, s. 27) were large enough to include the case before them, and that the respondent, though his domicile was America, was still a natural-born British subject, and could not shake off his allegiance. Having regard to the expressions of Lord Penzance in *Wilson v. Wilson* (i), quoted above, which agree with the almost unanimous views of foreign jurists, and to the view which the English Courts have taken of foreign divorces where the parties have been domiciled in England, it must be admitted that the decision in *Deck v. Deck* is an anomalous one, and it cannot be regarded as an accurate exposition of the present state of the law on the subject. In *Bond v. Bond* (k) it did not distinctly appear whether the respondent's domicile was Irish or not, and the Court therefore assumed the required jurisdiction, observing that the case was in substance the same as that of *Deck v. Deck*, which was decided on the same day. *Yelverton v. Yelverton* (l) was a suit by the wife for a restitution of conjugal rights, the place of the celebration of the marriage being Scottish and the domicile of the husband Irish, and the Court held that they had no jurisdiction, after a careful examination of the older cases on the subject. It was further held expressly in this

Sir J. Hannen held that domicile gave jurisdiction, and seems to have avoided saying that less than domicile would do so. In *Ingham v. Sachs* (1887), 57 L. T. 920, Butt, J., appears to have followed the principle of *Niboyet v. Niboyet*, so far as to recognise the validity of a dissolution in Berlin of a marriage there contracted between a domiciled Austrian and a Prussian woman, apparently on the ground that the husband was *bona fide* resident in Berlin. It is, however, stated in the *Law Magazine and Review*, vol. xiii., p. 85, that the facts in this case were not fully disclosed to the Court, and that the residence in Berlin was "purely collusive."

(f) (1865), App. Cas. 517.

(g) *Armytage v. Armytage*, [1898] P. 178.

(h) (1860), 2 Sw. & Tr. 90; 29 L. J. P. & M. 129.

(i) (1872), L. R. 2 P. & D. 441.

(k) (1860), 2 Sw. & Tr. 93. See, however, as to assumption of jurisdiction, *supra*, p. 152.

(l) (1859), Sw. & Tr. 574.

case that the wife could not, as a married woman, acquire any domicile other than her husband's under any circumstances, but the latter *dicta* as to this have already been examined while treating of domicile (*m*), and it may be now taken that either a judicial separation from or desertion by her husband will enable her to do so (*n*), though it will not entitle her to sue for a divorce in her new *forum*. In *Callwell v. Callwell* (*o*) neither the place where the marriage had been contracted nor the domicile of the husband, who was the petitioner, was English, but the wife appeared, and so submitted to the jurisdiction of the Court. Had it not been for such submission, it does not appear that the decree which was made in that case could have been supported.

In *Simonin v. Mallac* (*p*) the Court assumed jurisdiction to inquire into the validity *ab initio* of a marriage celebrated in England, and refused a decree of nullity, though such a decree had been obtained in France, where the parties had been domiciled throughout. It is obvious, however, that such an inquiry belongs especially to the *forum loci contractus*, and it would be a very different thing for an English Court to assume to dissolve a marriage for causes arising after its celebration, where the matrimonial domicile was foreign, merely on the ground that it had been originally celebrated in this country. The decisions, however, of the English Courts in cases where the circumstances have been reversed, and they have been called upon to consider the validity of divorces by decrees of foreign Courts where the matrimonial domicile has remained English, are all in point in considering the present question, and have already been discussed in their proper place. The words, however, of Lord Penzance in *Shaw v. Attorney-General* (*q*) are deserving of attention in connection with this subject. "No case," he says, "has ever yet decided that a man can, according to the laws of this country, be divorced from his wife by the tribunals of a country in which he has never had either domicile or residence. He has never submitted himself, either directly or inferentially, to the jurisdiction of such a court, and has never, by any act of his own, laid himself open to be affected by its process, if it never reaches him. A judgment so obtained has, therefore, in addition to the want of jurisdiction, the incurable vice of being contrary to natural justice, because the proceedings are *ex parte*, and take place

(*m*) *Vide supra*, chap. ii.

(*n*) *Le Sueur v. Le Sueur* (1876), L. R. 1 P. D. 139; *Dolphin v. Robins* (1859), 7 H. L. C. 390.

(*o*) (1860), 3 Sw. & Tr. 259; so in *Zycklinski v. Zycklinski* (1862), 2 Sw. & Tr. 420, *infra*. But on this point both these cases are overruled by *Armitage v. Att.-Gen.* (*Gillig cited*), *Gillig v. Gillig* [1906] P. 135. (See *supra*, p. 149.)

(*p*) (1860), 29 L. J. P. & M. 97.

(*q*) (1870), L. R. 2 P. & D. 156.

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in the absence of the party affected by them." And in accordance with this reasoning it has been held that if a husband whose jurisdiction is foreign appear unconditionally to a petition in the Divorce Court, and take a practical step in the cause, or by obtaining further time to answer, he cannot afterwards contest the jurisdiction, but must answer to the merits. Under such circumstances his proper course would have been to have appeared under protest (r).

It was said in *Mitford v. Mitford* (rr) that, although a foreign decree of divorce or nullity may not be decisive for all purposes, it is too narrow a proposition to assert that it is only decisive as to the mere solemnities. Here the husband, a domiciled Englishman, went through a ceremony of marriage with a German woman domiciled in Germany, in that country, the marriage being valid by German law. Subsequently the wife obtained a decree of nullity from the German Court on the ground of mistake, which was valid by German law but invalid by English law. The wife subsequently married von Kuhlmann, a German citizen, whereupon the husband presented a petition for divorce on the ground that the first marriage was still subsisting, and alleging as adultery his wife's cohabitation with von Kuhlmann. In dismissing the petition Duke, P., refused to go into the merits of the marriage. The decree of a foreign Court is of course examinable here, "but when the validity of a marriage arises for determination in a Court which has jurisdiction over the subject-matter and over the parties and which proceeds in accordance with what in English law are deemed to be the requirements of natural justice, the judgment pronounced there would seem to be as conclusive as a like judgment in any other civil proceeding." As Lindley, M.R., said in *Pemberton v. Hughes*, [1899] 1 Ch., at p. 790, if the foreign Court has jurisdiction in this sense and to this extent, English Courts never inquire whether the jurisdiction has been properly or improperly exercised, provided always that no substantial injustice, according to English notions, has been committed.

Where neither party to a marriage was domiciled or resident within the jurisdiction and their only connection with the United Kingdom at the date of their marriage was that they came over here one day for the purpose of being married and their only matrimonial residence was abroad, the Court cannot decree

Restitution
of conjugal
rights.

(r) *Zycklinski v. Zycklinski* (1862), 2 Sw. & Tr. 420; and see also *Callwell v. Callwell* (1860), 3 Sw. & Tr. 259. But since *Le Mesurier v. Le Mesurier*, [1895] A. C. 517, and *Armytage v. Armytage*, [1898] P. 178, *qu.* whether the Court would assume the jurisdiction, where the domicile was foreign, even if the husband appeared unconditionally. See *supra*, p. 152, as to assumption of jurisdiction.

(rr) [1923] P. 130.

restitution of conjugal rights. Thus in *De Gasquet James (Countess) v. Mecklenburg-Schwerin (Duke)* (s), Sir Samuel Evans, P., held that neither under the Matrimonial Causes Act, 1857, or by any other Act was there any authority to give a citation and petition for restitution of conjugal rights beyond the jurisdiction of the Court. But *quære* whether in a case where service is duly and properly effected and where no question arises as to the jurisdiction of the Court to pronounce a decree, such decree cannot be served out of the jurisdiction.

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By the new rules under the Matrimonial Causes Act, 1857, made by Sir Samuel Evans, P., Rule 221, in a suit for restitution of conjugal rights, where it appears from the petition that the parties to the suit are domiciled in England at the date thereof; or that they had a matrimonial home in England at the time when cohabitation ceased; or that they were both resident in England at the time of the institution of the suit, the citation and sealed copy of the petition may be served either within or without His Majesty's dominions. And by Rule 222, where a suit for restitution of conjugal rights has been duly instituted and a decree made therein, such decree may be served either within or without His Majesty's dominions (ss).

The English Courts have no jurisdiction over a co-respondent domiciled abroad (t). He will, on his own application, be dismissed from a suit, notwithstanding the fact that he has entered an appearance without protest (tt). But a petitioner may obtain leave to proceed without citing him (u). The proper course is to give him notice of the proceedings, so that he may appear and defend if he so desires (x), or apply to be dismissed from the suit (y).

Jurisdiction
as to a co-
respondent
domiciled
abroad.

The English Courts have jurisdiction, apart from all questions of domicile, to declare an existing marriage to be null if it was celebrated in England (z), or if the respondent is resident in

Nullity of
marriage.

(s) [1914] P. 53.

(ss) See *Perrin v. Perrin*; *Powell v. Powell*, [1914] P. 135.

(t) *Vardopulo v. Vardopulo* (1909), 25 T. L. R. 578, C. A.; *Re Mackenzie, Mackenzie v. Edwards-Moss*, [1911] 1 Ch. 578; *Levy v. Levy and De Romance*, [1908] P. 256. In *Wray v. Wray and D'Almeida*, [1901] P. 132, substituted service was allowed on a co-respondent whose domicile was apparently Portuguese, but the point regarding jurisdiction was not considered.

(tt) *Baker v. Baker and Dwyer*, [1908] P. 257. Cf. *Fairfax v. Fairfax and De la Cruz* (1909), 25 T. L. R. 213.

(u) *Baker v. Baker and Dwyer*, [1908] P. 257.

(x) *Boger v. Boger*, [1908] P. 300.

(y) *Fairfax v. Fairfax and De la Cruz* (1909), 25 T. L. R. 213. In *Statham v. Statham*, [1912] P. 92, a co-respondent, on his application, was struck out of the proceedings, on the ground that, as an Indian prince, he was a reigning Sovereign to the extent of enjoying immunity from the jurisdiction of an English Court.

(z) The Matrimonial Causes Act, 1857, s. 6; *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67; *Linke v. Van Aerde* (1894), 10 T. L. R. 426. Cf. *Ogden v. Ogden*, [1908] P. 46, C. A.

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England, and not merely a transitory sojourner, at the date of the petition (a). On this matter the case of *Linke v. Van Aerde* (*infra*) may be referred to. Here the Court was asked to pronounce a decree of nullity in a marriage celebrated in England, where both parties were aliens, and neither of them was domiciled in England at the date of the petition. Gorell Barnes, J., said: "The marriage contract was entered into here, and on that ground this Court was asked to deal with it. In *Simonin v. Mallac* the parties to the marriage were domiciled French people; but the marriage was celebrated here, and the judge held that he had jurisdiction to deal with the contract. In *Sottomayor v. De Barros* (1877), 3 P. D. C. A., the parties were Portuguese, and not resident or domiciled here, but the case was decided here. In *Niboyet v. Niboyet* (1878), 4 P. D. 1, C. A., the Master of the Rolls said that the principles of dissolution of marriage did not apply to nullity suits, and that in these suits the validity of the ceremony was to be determined according to the law of the place in which it was celebrated. The jurisdiction of this Court to deal with the question of the validity of the marriage of the parties to the present suit was therefore clear."

Jurisdiction
for purposes
of judicial
separation,
&c.

It has been shown that the English Courts, in order to found jurisdiction for divorce, now demand that the matrimonial domicile should be English (with limited exceptions), but it appears to be settled that for purposes of judicial separation, as distinguished from divorce, matrimonial residence not amounting to domicile is sufficient (b). This jurisdiction is placed not only on the old ecclesiastical doctrine, which assumed jurisdiction *pro salute animæ*, but upon considerations of the necessity of affording protection and assistance in cases where mere police protection is inadequate. Some difficulty may arise as to what will amount to "residence" for this purpose; but it is suggested that the jurisdiction will be assumed in all cases where the husband and wife are actually living within the jurisdiction, otherwise than as mere travellers or birds of passage. So in *Anghinelli v. Anghinelli* (c), where the husband's domicile was Italian, but both the parties were living within the jurisdiction at the commencement of the suit. Whether or not a decree for judicial separation affected the status of the parties was not settled, said Swinfen Eady, M.R., but it was enough to say that the Court is

(a) Cf. *Niboyet v. Niboyet* (1878), 4 P. D. 1, per James, L.J., at p. 9. In *Roberts v. Brennan*, [1902] P. 143, in the case of a marriage celebrated abroad, Sir Francis Jeune followed *Niboyet v. Niboyet* on this point. Cf. also *Ogden v. Ogden*, [1908] P. 46, C. A.

(b) *Chetti v. Chetti*, [1903] 25 T. L. R. 146; *Armstrong v. Armstrong*, [1898] P. 178; *Christian v. Christian* (1897), 78 L. T. 86; *Firebrace v. Firebrace* (1878), 4 P. D. 63, 67; *Newton v. Newton* (1885), 11 P. D. 11; *Thornton v. Thornton* (1886), 11 P. D. 176.

(c) [1918] P. 247.

bound by the Act of 1857 to deal with the case upon the same rules and principles as those upon which the Ecclesiastical Courts would have dealt with it. "I am not prepared," said Warrington, L.J., "to accept the view that a decree for judicial separation does affect the status of the parties, but even if it does the statute prevents us from taking into consideration questions of international law." The Court was therefore held to have jurisdiction. And in *Graham v. Graham*, [1923] P. 31, where the respondent had a foreign domicile and was not resident within the jurisdiction at the time of service, and of the commencement of proceedings, Horridge J., held that the Court had no jurisdiction. This case was distinguished in *Eustace v. Eustace*, [1924] P. 45, where, since the husband respondent was domiciled in England, although not resident there at the date of the institution of the suit, Duke, P., held that there was jurisdiction to entertain a suit for judicial separation. There is, he said, a series of decisions supporting the view that in such cases there is jurisdiction where there is domicile and that there may be jurisdiction without domicile if there is residence.

In *Rudd v. Rudd*, [1924] P. 72, the parties, both domiciled in England, were married in that country in 1912. In 1914 the husband left his wife in England and went to Canada. In 1920 he obtained a divorce in the United States, of which the wife had no knowledge and received no notice. Horridge, J., found that there was no evidence that the husband had changed his domicile before instituting divorce proceedings, and that consequently the American Court had no jurisdiction. Further since the wife had no knowledge of the American proceedings she was not bound by them. Notice of the proceedings is a matter of natural justice and not merely a matter of procedure.

He made an order for restitution of conjugal rights.

It would appear clear that decrees for judicial separation, pronounced by Courts other than those of the domicile, can have no extra-territorial operation, and will only remain effective so long as the spouses (or at any rate one of them) remain within the jurisdiction (*d*). It would follow that relief is not likely to be asked for, or to be granted, where the "residence" has not something of a permanent character. According to Barnes, J., in *Armtyage v. Armtyage*, the jurisdiction includes power to provide for the custody of children of the marriage. It would further appear to follow, though not expressly decided, that it extends to suits for the restitution of conjugal rights or for alimony (*e*).

(*d*) See the language of Barnes, J., in *Armtyage v. Armtyage*, [1898] P. 178, at p. 196.

(*e*) See *Le Mesurier v. Le Mesurier*, [1895] A. C., at p. 531.

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There appears to be no power to order service abroad of a petition for restitution of conjugal rights, although such service of petition for nullity, dissolution, judicial separation, or jactitation of marriage is provided for by 20 & 21 Vict. c. 85, ss. 41, 42 (f).

When the Court has jurisdiction to dissolve a marriage, by reason of the parties having acquired a domicile within its jurisdiction, it has also jurisdiction under 22 & 23 Vict. c. 61, s. 5, to vary the marriage settlement, though the matrimonial domicile at the time of the marriage, and the execution of the settlement were foreign (g).

By the Matrimonial Causes Act, 1923 (13 & 14 Geo. 5, c. 19), the wife may petition for dissolution of the marriage on the ground that her husband has, since its celebration and since the passing of the Act (18th July, 1923) been guilty of adultery. The words in s. 27 of the Matrimonial Causes Act, 1857 "incestuous adultery or of bigamy with" and the words "or of adultery coupled with such cruelty as, without adultery would have entitled her to a divorce *a mensa et thoro* or of adultery coupled with desertion, without reasonable excuse, for two years or upwards" and all the words in the proviso are repealed.

(f) *Chichester v. Chichester* (1885), 10 P. D. 186; *Firebrace v. Firebrace* (1878), 4 P. D. 63, 69. As to the jurisdiction of the Indian Courts, which does not depend upon domicile, see *Warter v. Warter* (1890), 59 L. J. Prob. 87, and the Indian Divorce Act, 1869, s. 2.

(g) *Forsyth v. Forsyth*, [1891] P. 363; *Nunneley v. Nunneley* (1890), 15 P. D. 186.

CHAPTER V.

ARTIFICIAL AND CONVENTIONAL PERSONS,
INCLUDING FOREIGN CORPORATIONS, STATES,
SOVEREIGNS, AND AMBASSADORS.PART I.
PERSONS.

CAP. V.

*Foreign
Corporations.*

(i.) FOREIGN CORPORATIONS.

THE principle that laws are commands addressed to *persons*, which has been referred to above (a), renders it important to consider what entities come within that term. That corporations created by statute or charter of the British Crown are for most purposes “persons” within the contemplation of the law has long been decided (b); and Order LXXI. r. 1, of the Judicature Acts, 1873 and 1875, recognises the same principle by enacting that the word “person” shall, in the construction of the Judicature Rules, unless there is anything in the subject or context repugnant thereto, include a body corporate or politic. Postponing for the present the discussion of the rights and liabilities in an English Court of independent sovereign States, which are clearly designated by the phrase “bodies politic,” it will be useful to consider how far a corporation not created by British statute or charter may be considered as a body corporate or person, and in what respects its position in an English Court may be regarded as peculiar.

It is plainly only by a legal fiction that a corporate body, being an abstract and intangible creation of the law, can be regarded as a person at all. This has given rise to doubts whether the personality so created can or ought to be recognised in the Courts of any other Legislature than that which created it—whether, in fact, Great Britain or any other State has a right to create artificial persons which the Courts of other countries shall be bound to recognise. It is obviously only by a comity of nations, in the strictest sense of the word, that this recognition can be given. The Courts of all countries are open *prima facie* to natural persons, and to no others; and an intangible body which claims to possess a certain unity and individuality of its own by the law of a foreign State, cannot claim, as of right, to be treated,

Persons and
corporations.Artificial
personality.(a) *Ante*, Introductory chapter.

(b) See authorities cited in Grant on Corporations (1850), p. 4, n. (s).

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beyond the jurisdiction of that State, on the footing of an ordinary rational human being. Such recognition, in fact, could only be accorded between States whose systems of jurisprudence were characterised by the same general conceptions, and who had reached, approximately speaking, the same stage of civilisation. It would be impossible, unless these conditions were complied with, that the ordinary attributes of a person, such as domicile and capacity, could be consistently applied to these creations of a foreign law; and unless a foreign corporation which claimed our recognition was, by the law of the State which created it, substantially the same thing as a corporation created by statute or charter here, we should be unable to recognise it at all (c).

Inasmuch as no State can validly create a body corporate with authority to act or contract beyond its own territorial limits, there would at first sight appear to be some difficulty in admitting the right of a body corporate to sue in a foreign country on a contract there made, or for a tort there committed; and there appear to be some Canadian authorities against such a right being accorded (d). The right, however, of a foreign corporation to sue in this country is conferred by English law, and not by the law of the State which created it; and necessarily depends on the extent to which recognition is accorded to the law of such State. It is however, noticeable, that this point has been assumed rather than decided in this country (e).

The principle that a foreign corporation may sue as plaintiff by its corporate name in an English court was decided as long ago as 1730 in *The Dutch West India Co. v. Henriques* (f) and *Henriques v. Dutch West India Co.* (g), the latter of which was an appeal against a judgment on a *scire facias* brought by the plaintiffs in the first action against the bail of the defendant in that case.

Right of a
foreign
corporation
to sue.

(c) *General Steam Navigation Co. v. Guillou* (1843), 11 M. & W. 877; *Ingate v. Austrian Lloyd's* (1858), 4 C. B. (n.s.) 704; 27 L. J. C. P. 323.

(d) Lindley on Companies, 6th ed. (1902), p. 1222; citing Canadian judgments in *Bank of Montreal v. Bethune* (1836), 4 Upp. Can. Q. B. 341; *Genesee Mutual Insurance Co. v. Westman* (1852), 8 Upp. Can. Q. B. 487; *Union Rubber Co. v. Hubbard*, 6 Upp. Can. C. P. 77. The learned editor, however, points out that these are really decisions on questions of *ultra vires*.

(e) See *Saunders v. Sun Life Co. of Canada*, [1894] 1 Ch. 293; *Newby v. Van Oppen and Colt's Patent Firearms Co.* (1872), L. R. 7 Q. B. 293; and Lindley on Companies, 6th ed. 1222, cited above. Conventions have been entered into between Great Britain and several foreign States for the mutual recognition of companies and associations, commercial, industrial, or financial, constituted and authorised by the laws of either of the contracting States. The following conventions will be found in Hertslet's Commercial Treaties, at the references given below:—France (vol. xi. 218, xiv. 1036); Belgium (vol. xi. 74); Germany (vol. xiv. 374); Greece (vol. xii. 519); Italy (vol. xii. 1144); Spain (vol. xv. 1056); Tunis (vol. xiv. 547); and as to insurance companies (Austria) see vol. xv. 9; China, July 28, 1903 (vol. xxiii. 403); and Russia, Dec. 29, 1904 (vol. xxiv. 966). See now The Peace Treaties.

(f) (1724), 1 Str. 612.

(g) (1730), 2 Ld. Raym. 1535.

It was contended in argument for the appellants, that no recognisance in England could be given to this *Generalis privilegiata societas Belgica ad Indos Occidentales negotians*, inasmuch as the law of England did not take notice of any foreign corporation, nor could any foreign corporation in their corporate name and capacity maintain any action at common law in this kingdom. It was held, however, both by the King's Bench and the House of Lords, that the objection was untenable. In a note added by Lord Raymond to the report, it is said that the original action by the Dutch company, which was for money lent, &c., was tried at Nisi Prius before Lord King in 1734, when it appeared that the cause of action accrued in Holland. Lord Raymond proceeds: "Upon the trial, Lord Chancellor King told me he made the plaintiff give in evidence the proper instruments whereby by the law of Holland they were effectually created a corporation there. And after hearing the objections made by counsel, he directed the jury to find for the plaintiffs; who accordingly did, and gave them £13,720 damages; and afterwards a motion was made in the Common Pleas to set aside the verdict, but by the unanimous opinion of that Court the motion was denied" (g). This decision has been recognised and adopted in subsequent cases (h), and the principle that a foreign corporation may sue as plaintiffs cannot therefore now be questioned. It must, however, be taken subject to the qualification already referred to, that the foreign corporation, so called, must be something with the constitution and attributes of a body incorporated by English law. It was answered in argument to Lord Abinger, who said that the Court did not know what a corporation meant in France, that it was enough if the body referred to had in France the same incidents and immunities as a corporation in England (i). So Byles, J., says: "I doubted, and I still doubt, whether s. 16 (of the Common Law Procedure Act, 1852) can apply to a foreign corporation trading abroad. We have no means of knowing the constitution and attributes of such a body. It may be altogether different from our incorporated companies" (k). In the case last cited, the statute referred to was held not to have been intended to apply to foreign corporations; but the decision must be regarded as open to suspicion, having been questioned by Quain, J., in the later case of *Scott v. Royal*

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(h) *South Carolina Bank v. Case*, 8 B. & C. 427; *National Bank of St. Charles v. De Bernales* (1825), Ry. & M. N. P. C. 190; *Newby v. Van Oppen and Colt's Patent Firearms Co.* (1872), L. R. 7 Q. B. 293; *Scott v. Royal Wax Candle Co.* (1876), L. R. 1 Q. B. D. 404; *Westman v. A. E. Snickarefabrik* (1876), L. R. 1 Ex. D. 237.

(i) *General Steam Navigation Co. v. Guillon* (1843), 11 M. & W. 877, 889.

(k) *Ingate v. Austrian Lloyd's* (1858), 4 C. B. (N.S.) 704. Cf. the judgments in *Colquhoun v. Heddon* (1890), 24 Q. B. D. 491; 59 L. J. Q. B. 142.

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Liability of
a foreign
corporation
to be sued.

Wax Candle Co. (l). And it will be seen that in later cases the applicability to foreign corporations of Order ix. r. 8 (Judicature Acts), which is practically a re-enactment of the section above mentioned, has been fully recognised (*m*). But the principle does not extend to foreign partnerships (*n*). It has been recognised that a foreign corporation can apply under s. 103 of the Patents Act, 1883 (46 & 47 Vict. c. 57) (*o*).

The principle that foreign corporations might be recognised when suing as plaintiffs was not extended to their appearance as defendants until a considerably later date. It was pointed out by Williams, J., in *Ingate v. Austrian Lloyd's (p)*, that there was then (1858) no precedent for admitting foreign corporations to defend an action at law in their corporate capacity; but they had certainly been treated as defendants in the Courts of Chancery, and in *Carron Iron Co. v. Maclaren (q)* an injunction was granted by the Master of the Rolls against a Scotch, *i.e.* a foreign, corporation. In the latter case, though objection was taken to the sufficiency of the service, and the presence of the company within the jurisdiction was denied, it was not contended that an English Court was incompetent to treat a foreign corporation as defendants, if proper service of the writ was effected upon them. It was not, however, directly held that it was competent to do so until *Newby v. Van Oppen (r)*. "It is true that we are not aware," said Blackburn, J., "of any reported case in which a foreign corporation has been sued in a court of law; but it seems to follow, from their being permitted to sue as plaintiffs, that they must be suable as defendants. It is, however, enough to say that we will not on this ground prevent the plaintiff from proceeding. The corporation may, if so advised, raise the question after appearing on the record." It should be remarked that, in this case, the defendant corporation was *de facto* carrying on business in England, though it does not appear that this fact was relied upon in the judgment on the question whether the action was maintainable. So it has been held, since the passing of the Judicature Acts, that the provisions in the schedule

(l) (1876), L. R. 1 Q. B. D. 404, at p. 409; and see per Bramwell, B., *Westman v. A. E. Snickarefabrik* (1876), L. R. 1 Ex. D. 237, 240.

(m) *Scott v. Royal Wax Candle Co. (ante)*, and *Mason v. Comptoir d'Escompte de Paris, infra*.

(n) *Russell v. Cambefort* (1889), 23 Q. B. D. 526.

(o) *Re Société du Temple*, [1895] 13 Rep. Pat. Ca. 54; *Re Carez's application for a Patent* (1889), 6 Rep. Pat. Ca. 552.

(p) (1858), 4 C. B. (N.S.) 704, 709.

(q) (1852), 5 H. L. C. 416; so service ordered by Court of Chancery on an Irish corporation in *Lewis v. Baldwin* (1848), 11 Beav. 153; see *Maclaren v. Stainton* (1852), 16 Beav. 285.

(r) (1872), L. R. 7 Q. B. 293. Recently the same principle has been recognised in *Mason v. Comptoir d'Escompte de Paris* and *Haggin v. Same* (1889), W. N. 129. See *infra*.

to these Acts for service of writs of summons or notice thereof out of the jurisdiction apply to actions against a foreign corporation resident out of the jurisdiction (s). "The language of Order XI. r. 1," said Cockburn, C.J., "appears to me large enough to include foreign corporations, and to be as applicable to them as to foreign subjects." "There is nothing in the language of the order," said Quain, J., "to sanction our making any difference between a foreign subject and a foreign corporation—between a natural person and an artificial person—in respect of service, and there is no reason in the nature of things why we should. With regard to the decision in *Ingate v. Austrian Lloyd's* (t), that s. 19 of the Common Law Procedure Act, 1852, did not apply to a foreign corporation, I should like to have that decision reconsidered if it were necessary." It has been decided, however, that notice of the writ of summons must be served, service of the writ itself having been set aside by the Exchequer Division of the High Court (u). "I am of opinion," said Bramwell, B., in the case last cited, "that we ought not to set aside the order permitting the issue of the writ, *because a foreign corporation is suable in this country*, and so a writ may lie against it." It can hardly be said without arguing in a circle, so far as this particular judgment is concerned, that it must be inferred that a foreign corporation is suable here because the Legislature had made provisions for serving notice of writs which have been construed as applicable to them; but that reasoning is quite consistent with the decision of the Queen's Bench Division in *Scott v. Royal Wax Candle Co.* (x), and with the admitted right of the Court of Chancery to order service on a foreign corporation out of the jurisdiction, prior to the passing of the Judicature Acts.

It has been said that Blackburn, J., in *Newby v. Van Oppen and Colt's Patent Firearms Co.* (y) affirmed the abstract proposition that a foreign corporation is suable in England. In that case the foreign corporation had a branch office and carried on business in England, and it was further held that service in such a case must be on a clerk or officer in the nature of a head officer, whose knowledge would be the knowledge of the corporation (z), in accordance with the English common law rule,

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corporation.

(s) *La Bourgogne*, [1899] 68 L. J. P. (H. L.) 104; *Lhoneux, Limon & Co. v. Hong Kong, &c. Corporation* (1886), 33 Ch. D. 446; *The Princesse Clémentine*, [1896] P. 18; *Scott v. Royal Wax Candle Co.* (1876), L. R. 1 Q. B. D. 404

(t) (1858), 4 C. B. (N.S.) 704; 27 L. J. C. P. 323.

(u) *Westman v. A. E. Snickarefabrik* (1876), L. R. 1 Ex. D. 237.

(x) (1876), L. R. 1 Q. B. D. 240.

(y) (1872), L. R. 7 Q. B. 293.

(z) See Tidd's Practice, ed. 1828, p. 121; 2 Will. 4, c. 39, s. 13; 15 & 16 Vict. c. 76, s. 16, re-enacted in the Judicature Act; Rules; Ord. ix., 2, 8.

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re-enacted by statute, as to the proper service of a writ upon a corporation aggregate. It was with reference to this point alone that the subsequent case of *Mackereth v. Glasgow and South-Western Railway Co.* (a) was decided, and the question of the liability of a foreign corporation to be sued at all does not therefore seem to be affected by it. The defendants in that case were a Scotch corporation, with running powers over an English railway to Carlisle, and their only officer in England, upon whom the writ was served, was a booking-clerk at Carlisle, whose sole duty it was to issue tickets to travellers. It was held, that the booking-clerk was not a head officer or clerk of the defendants upon whom service of the writ could properly be made, and that the defendants did not in any sense reside or carry on business (b) at Carlisle, so as to come within s. 16 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76). According to the decisions under the Judicature Acts which have been already cited (c), the proper course under similar circumstances would be to obtain leave under Order II. r. 4, Order XI. r. 1, of the Schedule to the Judicature Acts, to issue a writ against the defendants, and to serve them with notice of such writ out of the jurisdiction, *i.e.* on their head officer at their Scotch head office. The general principle that a foreign corporation is suable in England, subject to the ordinary rule of English procedure as to effecting service, is in no way impaired by the judgment in *Mackereth v. Glasgow and South-Western Railway Co.*; nor is there in reality anything hostile to it in *Carron Iron Co. v. Maclaren* (d), which was relied on in argument. All that was decided in the latter case on this point was that an alleged agent of the company in England was not an agent for the purpose of being served with notice of an injunction; and that unless the defendants were either resident in England or were sued in respect of acts or property in England, an injunction of the English Court of Chancery ought not to be enforced. No difference was in fact made between the position of a Scotch corporation and a Scotch domiciled subject; and the distinction between a natural person and an artificial person created by a foreign law, was not referred to. That there is no such distinction for this purpose appears from a more recent case, where it was held that the exceptional privileges as to jurisdiction conferred on Scotchmen and Irishmen, domiciled or ordinarily

(a) (1873), L. R. S. Ex. 149.

(b) As to the meaning of the words "carry on business," see *Shiels v. Great Northern Ry. Co.*, 30 L. J. Q. B. 331; *Garton v. Great Western Ry. Co.*, 1 E. & E. 258; 28 L. J. C. P. 158.

(c) *Westman v. A. E. Snickarefabrik* (1876), L. R. 1 Ex. D. 237; *Scott v. Royal Wax Candle Co.* (1876), L. R. 1 Q. B. D. 240.

(d) (1852), 5 H. L. C. 416, 458.

resident in Scotland or Ireland (under the Judicature Rules), are applicable to corporations as to individuals (e).

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The existing law as to the service of writs on foreign corporations trading or carrying on business in England, is best expressed in the case of *La Bourgogne* (f). Service on a corporation is regulated by Order IX. r. 8 of the Judicature Acts, which requires service on a "head officer." It is a question of fact whether a company comes within the rule. Hiring an office, writing up the name of the company, paying taxes and expenses, are facts which afford strong evidence that the company is carrying on business in this country under such circumstances as to constitute residence here; and that the manager in charge is a "head officer" of the company within Order IX. r. 8. Nor is it inconsistent with this view that such manager should in addition carry on a business of his own, and pay the staff employed at the office. And by Order IX., r. 8A, where a contract has been entered into within the jurisdiction by or through an agent residing or carrying on business within the jurisdiction on behalf of a principal residing or carrying on business out of the jurisdiction service may be made on such agent. The effect of this rule, read in conjunction with r. 8, is to enable a plaintiff suing on a contract within its terms to obtain leave to serve a writ of summons on the agent in England, if any, who made the contract on behalf of a principal in a foreign country; without having to obtain an order for service out of the jurisdiction under Order XI. But the office or place of business need not be necessarily of a fixed character; and service has been effectually made on a manager or head officer of a foreign company renting a stand and offering goods for sale at a cycle show (i). It was said by Collins, M.R., in the case last cited, that the true test of residence by a corporation for the purposes of jurisdiction is "whether the corporation is conducting its own business at some fixed place within the jurisdiction, that being the only way in which a corporation can reside in this country. It can only reside through its agent, not being a concrete entity in itself; but if it so resides by its agent, it must be considered for this purpose as itself residing within the jurisdiction" (i). Also in recent years it has been held that the mere fact of a company being incorporated and registered in a foreign country, or

(e) *Watkins v. Scottish Imperial Ins. Co.* (1889), 23 Q. B. D. 285.

(f) *La Bourgogne*, [1899] H. L. 68 L. J. P. 9, 104; *Lhoneux, Limon & Co. v. Hong Kong, &c. Corporation* (1886), 33 Ch. D. 446; *Haggin v. Comptoir d'Escompte* (1889), 23 Q. B. D. 519; *Watkins v. Scottish Imperial Insurance Co.* (1889), 23 Q. B. D. 285.

(i) *Dunlop Co. v. Actiengesellschaft, etc., Cudell & Co.*, [1902] 1 K. B. 342.

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provisions.

even having its head office there (*k*), does not necessarily preclude it from having a residence in this country (*l*).

Now these principles as to service of process have received statutory sanction, and further rules have been provided to the following effect (*m*). Every company incorporated outside the United Kingdom which establishes a place of business within the United Kingdom must, within one month from such establishment, file with the registrar of companies (besides an English copy of the instrument constituting the company and a list of directors) the names and addresses of some one or more persons resident in the United Kingdom authorised to accept on behalf of the company service of process and any notices required to be served on the company, and must also file a notice of any alteration in such names or addresses. Any process or notice required to be served on the company shall be sufficiently served if addressed to any person whose name has been so filed and left at or sent by post to the address which has been so filed. Such a company must also conspicuously exhibit, on every place where it carries on business in the United Kingdom, the name of the company and the country in which it is incorporated.

Foreign companies subject to these provisions, but which have not complied with them, may be served in the same manner as heretofore.

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partnerships.

But though a corporation may thus be regarded as resident in England, and perhaps in other places at the same time, for the purposes of jurisdiction, this does not apply to partnerships, which have no corporate existence apart from the individuals composing them. By Order XLVIII., a foreign partnership carrying on business within the jurisdiction may now be sued and served in the same way as English firms in the firm name. So in

(*k*) *New Zealand Shipping Co., Ltd. v. Stephens* (1907), 24 T. L. R. 172, C. A.

(*l*) This will hold good at all events for the purposes of the Income Tax Acts; cf. *Goerz & Co. v. Bell*, [1904] 2 K. B. 136; *De Beers Consolidated Mines, Ltd. v. Howe*, [1906] A. C. 455. See also *Saccharin Corporation, Ltd. v. Chemische Fabrik von Heyden Actiengesellschaft*, [1911] 2 K. B. 516, C. A., where it was held that under Order ix. rule 8, a foreign corporation may be served with a writ, although they are not tenants of any place of business in England, if the Court is satisfied that they carry on business at a fixed place here which may be said to be their place of business, as, for example, by an agent for the sale of their goods who is paid by commission and who rents an office in the City of London, on the door of which the name of the corporation is painted, and where he performs every operation involved in the sale of their goods in this country. Again in *Actiesselskabet Dampskib "Hercules" v. Grand Trunk Pacific Ry.*, [1912] 1 K. B. 222, C. A., a foreign railway company had an office in London, and a board of directors dealing solely with financial matters, viz. the raising of money for purposes of the railway by the issue of debentures; held that the railway company were carrying on business in this country so as to be resident here; so that a writ could be served here on their secretary under Order ix. rule 8.

(*m*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 274 [Companies Act, 1907 (7 Edw. 7, c. 50), s. 35].

Von Hellfeld v. Richnitzer, [1914] 1 Ch. 748, where three persons carrying on business out of the jurisdiction were sued and served in their firm name of Mayer Frères & Co., the proceedings were set aside. "According to the law of England," said Buckley, L.J., "the firm of Mayer Frères & Co. is not a separate legal entity. According to our law it can be only a name descriptive of Charles, Paul and Michael Mayer, and although, if that firm were an English firm or a foreign firm carrying on business here the plaintiff could describe them by that name, yet after all he would still, according to our procedure and our rules, be taken as having included under that name the three natural persons Charles, Paul and Michael. The rules do not enable him so to describe them when they are a foreign firm, and there is nothing in the rules to relieve him, whether it be an English or a foreign firm from taking such steps in that he is suing the three persons, Charles, Paul and Michael. If it were an English firm he could describe them by the abbreviation, but a foreign firm he cannot.

The position of foreign corporations as ordinary litigants having been determined, it is next desirable to consider how far they can be affected by special statutory regulations for their liquidation or control. To what extent the compulsory provisions of the Companies Act, 1862, for winding up companies apply to such cases is not strictly a matter of international law, and has been regarded rather by English Courts as a question of the intention of the English Legislature. The principle of their applicability was first accepted with regard to companies created by a subordinate jurisdiction of the British Empire. Thus, a winding-up order was made against an Indian corporation having a branch office and agent in England (*o*). In a similar case it was apparently assumed that a like order could have been made under the 11 & 12 Vict. c. 45, but the application was refused on the ground of its inexpediency (*p*). But with regard to strictly foreign associations, considerable doubt as to the jurisdiction has been expressed. "Their lordships are clearly of opinion," said James, L.J., in another case (*q*), "that the Companies Act, 1862, never contemplated that a foreign partnership, actually complete and existing in a foreign country, could be brought within the purview of the English Act of Parliament, the English Legislature having no power over the shareholders of such a company." It was accordingly held, that the Consular Court in Egypt could not issue a sequestration against such of the members of a railway company and partnership in Egypt as were resident within its jurisdiction, for not complying with an order

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Corporations.Foreign
corporations
—how far
controlled
by the
Companies
Act.

Winding up.

(*o*) *In re Commercial Bank of India* (1868), L. R. 6 Eq. 517.

(*p*) *In re Union Bank of Calcutta* (1850), 3 De G. & S. 253.

(*q*) *Bulkeley v. Schultz* (1871), L. R. 3 P. C. 764, 769.

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of that Court to register the company as one of limited liability under the Companies Act, 1862. The order, however, was obviously ineffectual for other reasons, being merely addressed to the only two members of the committee of the railway company who resided within the jurisdiction of the Court, and who had no other claim to represent the partnership. Nor is a process purporting to compel the registration of an existing company the same in principle as a winding-up order, whether the company affected be already registered under the English statute or not. The "limited character" of a foreign corporation will be recognised in England, although it is not so registered under the Companies Act (r), which was said in the case cited to be only intended for domestic corporations. But any association which contemplates the management of, or any carrying on of business here may be so registered though consisting entirely of foreigners resident abroad, and though the principal business may be intended to be carried on abroad also (s). It is sufficient, if any business is to be carried on in any part of the United Kingdom (t). It would appear that this condition must be satisfied in order to obtain registration (u), but it may perhaps be doubted whether in practice registration even in such a case would be refused (x). And it is quite clear, that if a foreign association is once registered under the Act, a winding-up order can be made against it, though circumstances can easily be imagined under which it would be difficult for it to take effect (y).

The jurisdiction to make a winding-up order, however, has more recently been asserted in cases where no registration under the English statute has been effected. Thus an order has been made in the case of a New Zealand company, formed and having its principal place of business abroad, but having a branch office, agent, and assets in England (z). Nor does the pendency of a foreign liquidation affect the jurisdiction, although, in making such order the Court will, as a matter of comity, have regard to the order of the foreign Court (z). But there is no jurisdiction to make a winding-up order in the case of a foreign company which,

(r) *Bateman v. Service* (1881), 6 App. Cas. 386.

(s) *General Co. for Promotion of Land Credit, Reuss v. Bos* (1870), L. R. 5 Ch. 363; S. C. 5 H. L. (L. R.) 176.

(t) *In re International Pulp, &c. Co.* (1876), 3 Ch. D. 594, 597.

(u) *In re Union Bank of Calcutta* (1850), 19 L. J. Ch. 388; 5 De G. & S. 253.

(x) See, however, the language of James, L.J., in *Bulkeley v. Schultz* (1871), L. R. 3 P. C. 764.

(y) *Re Tumacacori Mining Co.* (1874), L. R. 17 Eq. 534, 540; *Reuss v. Bos* (1871), L. R. 5 H. L. 176; *Re Factage Parisien* (1864), 34 L. J. Ch. 140; *Re Madrid, &c. Railway Co.* (1849), 3 De G. & Sm. 127; 2 Macn. & G. 169.

(z) *In re Matheson Brothers, Limited* (1884), 27 Ch. D. 225, following *In re Commercial Bank of India* (1868), L. R. 6 Eq. 517. Similar orders were made in *Re Commercial Bank of S. Australia* (1886), 33 Ch. D. 174; and *Re English, Scottish and Australian Bank*, [1893] 3 Ch. 385, 394.

though it has carried on business in England by agents, yet has no branch office or "residence of its own" there (a). The meaning of "having regard, as a matter of comity, to the order of the foreign Court" is better developed in a later case (b), where North, J., said: "I think the winding up here will be auxiliary to the winding up in Australia, and, if I have the control of the proceedings here, I will take care that there shall be no conflict between the two Courts." But the procedure in the English Court will nevertheless be regulated by its own rules. "The general principle is—ascertain what is the domicile of the company in liquidation; let the Court of the country of domicile act as the principal Court to govern the liquidation; and let the other Courts act as ancillary, as far as they can, to the principal liquidation. But although that is so, it has always been held that the desire to act as ancillary to the Court where the main liquidation is going on will not ever make the Court give up the forensic rules which govern the conduct of its own liquidation" (c). No distinction has in these later cases been taken between associations created by a subordinate jurisdiction, and associations of a strictly foreign character; but it will be observed that only one instance of the latter class has been cited, and in that the winding-up order was refused on the ground that the condition of a branch office in England was not complied with (d).

By ss. 267, 268, of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), a foreign or colonial company, possessing a branch office or place of business and assets in this country, may be wound up as an unregistered company under the Act, although the Court cannot dissolve it as a corporation.

Where a winding-up order has been made, actions, not only in England, but in all other parts of the United Kingdom, will be restrained, subject to any advantage by priority already gained (e) under ss. 87, 122, of the Companies Act. From the language of Jessel, M.R., in *Re International Pulp, &c. Co.* (*infra*), it would appear that the only reason why a strictly foreign action cannot be restrained under the same sections is the want of jurisdiction to control it. This would seem to imply that a foreign plaintiff coming in as a creditor under the English

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(a) *In re Lloyd Generale Italiano* (1885), 29 Ch. D. 219. Cf. *Bulkeley v. Schultz* (1871), L. R. 3 P. C. 764, 769; *Bateman v. Service* (1881), 6 App. Cas. 386. As to service of a writ on a corporation under such circumstances, see *La Bourgogne*, [1899] H. L. 68 L. J. P. 104; *ante*, p. 167.

(b) *In re Commercial Bank of S. Australia* (1886), 33 Ch. D. 174.

(c) *Re English, Scottish and Australian Bank*, [1893] 3 Ch. 385, at p. 394; per Williams, L.J., speaking with reference to the representation of foreign creditors by proxy.

(d) *In re Lloyd Generale Italiano* (1885), 29 Ch. D. 219.

(e) *In re Queensland Merc. Agency Co., Ex parte Australian Investment Co.* (1888), W. N. 62; *In re International Pulp, &c. Co.* (1876), 3 Ch. D. 594, 599.

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winding up can be restrained, as a condition of relief here; nor does it appear that there would be any distinction for this purpose between a winding up and an ordinary bankruptcy. On analogous principles, an injunction has been granted against a Scotch solicitor, agent in Scotland of the official liquidator in England, from attaching assets in Scotland to pay his costs, although evidence was given that the Scotch law allowed the remedy he had adopted. It was held that he was in the same position as an English agent would have been in England, and that his proper remedy was in the liquidation (*f*).

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insurance
companies—
deductions
from
income-tax
returns.

The applicability of English statutes to foreign companies or corporations not strictly constituted by English law has been also considered from the point of view of revenue legislation. The extension into Great Britain of the business of several large American insurance companies has given rise to a question how far persons insured with them are entitled to deduct the amount of their annual premiums from their income-tax returns, under the statutory privileges conferred by 16 & 17 Vict. c. 34, s. 54, and 16 & 17 Vict. c. 91. By the language of the last-mentioned Act, the privilege was confined to persons insured “in or with any insurance company existing on the 1st of November 1844, or in or with any insurance company registered pursuant to the Act 7 & 8 Vict. c. 110.” In *Colquhoun v. Heddon* (*g*) the question arose with reference to an American insurance company which existed—in America—before November 1844; and it was held that the statutory privilege did not apply—*i.e.* that the words “any insurance company existing,” &c., did not extend to American companies. The principal ground of the decision was that the Registration Act referred to (7 & 8 Vict. c. 110) appeared to be confined to English companies, and that the 1st of November 1844 was the date on which it came into practical operation. The Court of Appeal have affirmed the decision (Fry, L.J., *dubitante*), holding that the reference in the Act to the month of November 1844, taken in conjunction with the terms of 7 & 8 Vict. c. 110, was enough to show that foreign companies were not intended to be included. On the general question, whether the words “any existing company” in an English statute extended or not *prima facie* to foreign companies, Lord Esher said that an Act, unless expressly so intended, ought not to be supposed to deal, directly or indirectly, with any person outside the jurisdiction of Parliament. Lord Justice Fry dissented from this view; and said, in effect, that the words would *prima facie* include foreign corporations, unless they pro-

(*f*) *In re Herman Loog, Limited* (1884), 36 Ch. D. 502.

(*g*) *Colquhoun v. Heddon*, [1890] 24 Q. B. D. 491; 59 L. J. Q. B. 142; affirmed on appeal, 25 Q. B. D. 127.

posed to do anything in violation of the comity of nations by asserting a right of control over a company not subject to the jurisdiction. The latter view appears to be more in accordance with theory. Legislation deals with persons natural or artificial, not on the view that they are in fact within the jurisdiction, but on the view that they may subsequently come within it. The mere *passing* of an Act, in ordinary cases, affects nobody. It is the *operation* of an Act which affects persons; and an Act operates from time to time on the persons who are or have become subject to it. An Act which provides for the future with respect to insurance companies has as good a right to legislate for foreign companies, which may subsequently carry on business in England, as for English companies, which do so at the date of its commencement.

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It has already appeared that corporations are regarded as persons capable of "residence" beyond the territorial limits of the State by whose Legislature they were created, and it therefore becomes of interest to consider how far they are considered as possessed of domicile, and by what rules that domicile is governed. A corporation being in fact a mere intangible creature of the law, its domicile must be merely a conception introduced for purposes of jurisdiction and law. It is commonly supposed that a company resides where it has its central office for the transaction of its business (*h*); and certainly, when it is also registered under and created by the laws of that jurisdiction, it must be regarded as having its domicile there, if anywhere. The question then arises, whether a corporation can in any case have two domiciles?—as, for example, when it has its head office for the transaction of business in one State, and is registered under the statutes of another: or when it has important offices, and carries on distinct business within each jurisdiction. In *The Carron Iron Co. v. Maclaren* (*i*) an injunction had been obtained against a Scotch corporation, restraining it from taking certain proceedings in Scotland, and notice of the injunction was served both on the company's agent in London, and on the manager in Scotland. The company did not appear, and the injunction was afterwards dissolved on their motion. Lord Cranworth laid down that there was no rule or principle of the Court of Chancery which, after a decree for administering a testator's assets (which was the case under discussion), would induce it to interfere with a foreign creditor resident abroad, suing for his debt in the Courts of his own country, and that over such a creditor the Courts here could

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(*h*) *Dunlop Co. v. Actiengesellschaft, etc., Cudell & Co.*, [1902] 1 K. B. (C. A.) 342, per Collins, M.R.

(*i*) (1852), 5 H. L. C. 416; *S. C. sub nom. Maclaren v. Stainton* (1852), 16 Beav. 279. Followed in *In re Boyse, Crofton v. Crofton* (1880), 47 L. J. Ch. 689.

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exercise no jurisdiction whatever. This was in effect an enunciation of the principle that a person domiciled abroad is not justiciable to the order of an English Court, except in respect of acts done or to be done in England, or in respect of property locally situate in England (*k*). It was then further laid down that on the facts the Carron Iron Company, so far as they could be said to have any locality at all, must be considered as a body "locally situate" in Scotland; and that the fact that they had property in England, and a resident agent for the sale of their goods, though it might enable the Court to make its injunction effectual, could not justify its issue. The company was therefore regarded as having its domicile in Scotland, but it was not directly laid down that it might not have been also regarded as domiciled in England if the facts had warranted such a view. It was said, indeed, by Lord St. Leonards, who dissented from Lord Brougham and Lord Cranworth in the House of Lords, that it might. "This company, I think, may properly be deemed both Scotch and English. It may, for the purposes of jurisdiction, be deemed to have two domicils. Its business is necessarily carried on by agents, and I do not know why its domicile should be considered to be confined to the place where the goods are manufactured. The business transacted in England is very extensive. The places of business may, for the purposes of jurisdiction, be properly deemed the domicile" (*l*). It is to be observed that the *dicta* of Lord St. Leonards do not go the length of saying that a corporation may have two domicils for any purposes except those of jurisdiction, and the peculiar nature of the jurisdiction claimed should also be remembered. It will be seen in its proper place (*m*) that mere transient residence within the jurisdiction, coming far short of domicile, will be held to justify an English Court in acting *in personam*, when there is any equity affecting the person in relation to an act done or to be done, or to property locally situate in England. This sort of domiciliary residence, for the purpose of founding jurisdiction, is, in fact, the same condition as that which it has been already shown is required for the purpose of making a winding-up order against a non-registered foreign company. Such a winding-up order is refused where the company has no branch office, or "residence of its own," in this country (*n*).

(*k*) Story, §§ 539, 540. Cf. *Cobke v. Charles A. Vogeler Co.*, [1901] A. C. 102, per Lord Halsbury.

(*l*) (1852), 5 H. L. C. 416, 449. It is probably to this view of double or multiple domicile, for the purposes of jurisdiction, that Cotton, L.J., refers in *Haggin v. Comptoir d'Escompte de Paris* (1889), W. N. 129. The theory does not extend to a foreign partnership: *Russell v. Cambefort* (1889), 23 Q. B. D. 526. And see *St. Gobain v. Hoyerman's Agency*, [1893] 2 Q. B. 96.

(*m*) *Infra*, chaps. vi. (i.), vii. (i.), viii. (i.).

(*n*) *In re Lloyd Generale Italiano* (1885), 29 Ch. D. 219.

It is seldom, in fact, that the *domicil* of a corporation, strictly speaking, can come in question. The cases in which the test of domicile is usually applied are those which arise on questions of marriage, divorce, legitimacy, and succession; matters in which no legislation can give the so-called person of a corporation the power of partaking. What is most commonly disputed is the applicability or non-applicability of certain statutes which use the words "residence" or "carrying on business," to the facts proved with regard to a foreign corporation: and between these cases and those which turn on domicile proper there is a narrow but well-defined line to be drawn. Residence itself is, of course, a term not strictly applicable to a corporation. Its use, in the words of Huddleston, B. (o), is founded upon the habits of a natural man, and is therefore inapplicable to the artificial and legal person to which the name corporation is given by the law. Nevertheless, as residence has been appointed for some purposes as the test of a trader's liability to the jurisdiction of the Crown, and as a corporation can undoubtedly trade, it has become necessary to determine how far a corporation can reside. By schedule D. to the 2nd section of 16 & 17 Vict. c. 34, duties are granted to the Crown (*inter alia*) "in respect of the annual profits or gains arising or accruing to any person residing within the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be carried on in the United Kingdom or elsewhere." By s. 5 of the same statute and by 5 & 6 Vict. c. 35, s. 40, the word "person" as used here, includes "corporation" or "joint-stock company." The residence of a corporation within the United Kingdom is therefore made a conclusive test of its liability to pay income tax in respect of the whole of its yearly gains, wherever made.

The cases that have been decided on the question of the "residence" (p) of a corporation within the United Kingdom, for these purposes, by no means support the *dicta* of Lord St. Leonards in *The Carron Iron Co. v. Maclaren* (q), just referred to, as to the possibility of a company having a double residence or domicile (r). In *The Attorney-General v. Alexander* (s), the question was as to the liability under the section of the Income Tax

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(o) *Cesena Sulphur Co. v. Nicholson* (1876), L. R. 1 Ex. D. 428, 452. See *infra*, p. 177, as to the extent to which this decision is affected by *Colquhoun v. Brooks* (1889), 14 A. C. 493.

(p) But the expression "residence" seems to be susceptible of more than one interpretation, *Re Bowie, Ex parte Breull* (1880), 16 Ch. D. 484 (C. A.), per James, L.J., at p. 486; and cf. *Turnbull v. Inland Revenue*, [1904] 7 F. (Ct. of Sess.) 1.

(q) (1852), 5 H. L. 416, 449.

(r) The possibility that a corporation may have more than one residence was raised also, but not specifically decided, in *Goerz & Co. v. Bell*, [1904] 2 K. B. 136, per Channell, J., at p. 146.

(s) (1874), L. R. 10 Exch. 20.

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Acts, cited above, of the Imperial Ottoman Bank. It was proved that the bank was a corporation created by Turkish law, and had its seat fixed, by the concession and the statutes which constituted it, at Constantinople, with power to establish branches and agencies at other places. It was the State bank of Turkey, where it was a bank of issue, and was charged with the collection of the revenue, and with certain operations relating to the currency, and with the payment of interest on the public debt, and received from the State a subsidy on account of the business transacted by it. On its creation it took over and continued to carry on the business of an English bank in London; and, since its creation, the annual meetings of shareholders had always been held, and dividends declared, in London; though the statutes permitted the annual meetings to be held at any place which the committee of management might fix. It was held that the bank must be regarded as residing at Constantinople alone, where it had its seat, and not in London, and that it was consequently only liable to pay income tax on the profits made by it in England. "We have to deal with this question," said Cleasby, B., "merely upon the words 'any person residing in the United Kingdom.' Now, if residence could not be predicated of a corporation, if the idea were not applicable to a corporation under this Act of Parliament, then, of course, the first branch of the schedule could not apply. The argument is not put on that ground; and we have to consider whether it is made out, not only that the word 'person' is fulfilled by this body, which is a corporation, but whether the terms 'residing within the United Kingdom' are also satisfied. . . . It appears to me sufficient to say that, looking at the constitution of the Imperial Ottoman Bank, we can see it did not carry on business in England in such a sense that we should be justified in saying it resided here. . . . It is not made out that the bank is resident in England, or is even carrying on its business here, though *some* of its business is carried on here." "It was contended at first," said Amphlett, B., in the same case, "that a person carrying on business in London or elsewhere might be said to reside where he was carrying on business: so that, if he had two or three establishments in different countries, he might be said to reside in any of those countries. . . . But this was abandoned as untenable (*Sulley v. Attorney-General*, 5 H. & N. 711); and if that is so, if an individual cannot be said to reside wherever he carries on his business, how can a foreign corporation be said to reside within the kingdom for no other reason than that it carries on business there? It must follow the same rule. What then, is the reasonable meaning of a corporation residing

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anywhere? It appears to me that it is this : that a corporation may be said to reside wherever it has its seat."

The principle of these judgments is confirmed by the later decision in the analogous case of *The Cesena Sulphur Company v. Nicholson* (t), which depended upon the same statute. Both in that case and in the instance of *The Calcutta Jute Mills Company v. Nicholson*, which was argued at the same time, the corporation in question was incorporated under the English statutes (the Companies Acts, 1862 and 1867), with a board of directors who met in England, where the head office was situated. In both cases the profits were exclusively earned abroad, where the whole of the practical business was carried on; and in both cases it was decided that the company was resident in England, and must pay income tax upon the whole amount of its profits, wherever earned (u). The decision of Kelly, C.B., was based upon the ground that, whether there might or might not be more than one place at which the same corporation or joint-stock company resided, a joint-stock company did at any rate reside where its place of incorporation was, where the meetings of the whole company, or those who represented it, were held, and where its governing body met in bodily presence for the purposes of the company, and exercised the powers conferred upon it by statute and by the articles of association. "The use of the word 'residence,' " said Huddleston, B. (x), "is founded upon the habits of a natural man, and is therefore inapplicable to the artificial and legal person whom we call a corporation. But for the purpose of giving effect to the words of the Legislature an artificial residence must be assigned to this artificial person, and one formed on the analogy of natural persons. . . . I do not think that the principle of law is really disputed, that the artificial residence which must be assigned to the artificial person is the place where the real business is carried on." It will be seen that though Kelly, C.B., guarded himself from being supposed to lay down that a corporation could have but one residence, the language just cited is not limited by a similar restriction, and points strongly to that proposition. The language of Amphlett, B., in *The Attorney-General v. Alexander* is, as has been already pointed out, even more decided. It is obvious that if the artificial residence which is attributed to an artificial person is to be analogous to the natural residence

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(t) (1876), L. R. 1 Ex. D. 428.

(u) It will be found upon examination that these cases were questioned, if not over-ruled, as far as the *quantum* upon which income tax was payable, by *Colquhoun v. Brooks* (1889), 14 A. C. 493. So far as they illustrate the facts which amount to *residence* by a corporation, their authority does not seem to be interfered with.

(x) *Cesena Sulphur Co. v. Nicholson* (1876), L. R. 1 Ex. D. 428, 452, 454.

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attributed to a natural person, the analogy must be carried out consistently. The birth-place of a natural individual is not conclusive evidence of his domicil or his residence. It is *prima facie* evidence of his domicil of origin, and his domicil of origin is *prima facie* his actual domicil and residence *de facto*. He may be a man who once resided in one country, and now resides in another, but he can only be residing in one country at the time the inquiry is made (*y*). So in the case of an artificial person, incorporation and registration are or should be merely facts to be taken into consideration in determining the locality of the artificial residence which is to be attributed to the corporation. *Prima facie* they show where it resides; but if it is established that the seat of its business is elsewhere, that it has in fact left its birth-place, those circumstances are no more conclusive than is the circumstance of birth in the case of the natural individual (*z*). Further, just as a natural person must be pronounced, for the purposes of domicil, to be resident in some one place more than in any other, however nicely balanced the evidence may be, so a corporation should be regarded as necessarily having its seat or centre of operations (*der Mittelpunkt des Geschäftes—le centre de l'entreprise*) in some one spot to the exclusion of all others. It may be difficult to decide between two or more places whose claims appear conflicting, but it appears to be the duty of the law to pronounce between them, and to declare that in fact as well as in law one establishment is the centre where the corporation resides, while the other establishments are merely branch offices or agencies.

The domicil of a corporation is in fact the place where "the brain which controls the operations of the company is situate" (*San Paulo v. Carter*, [1895] 1 Q. B. 580; [1896] A. C. 31; *Goerz & Co. v. Bell*, [1904] 2 K. B. 136; *De Beers Consolidated Mines v. Howe*, [1905] 2 K. B. 612; [1906] A. C. 455; and *Mitchell v. Egyptian Hotels, Ltd.*, [1915] A. C. 1022). "The brain of a corporate body," says Dr. E. J. Schuster, K.C., "is situate in the place where those who direct its policy and its mode of action are accustomed to meet and to form their resolutions. Whether those present are designated by the name of 'directors' is immaterial. There may be nominal directors in one place and so-called 'local directors' in another place. If these local directors have merely to follow the orders given by the directors residing at the head office, they do not constitute the brains of the company. If, on the other hand, as appears to

(*y*) *Story*, § 45 a; *Somerville v. Somerville* (1801), 5 Ves. 786. This does not apply to mercantile domicil in time of war: *The Jonge Klassina* (1804), 5 C. Rob. 297.

(*z*) *Cesena Sulphur Co. v. Nicholson* (1876), L. R. 1 Ex. D. 428, 453.

have been shown in the *Egyptian Hotels Case*, the local directors determine the whole policy of the company the directors at the so-called head office do not count" (a).

And it would appear that the domicile of a corporation need not be located permanently in the same place. It was, for instance, provided in the articles of the Goerz Company that the head office might be either in London or elsewhere on the Continent, or in Johannesburg or at such other places elsewhere as the directors might from time to time determine.

The seat of a corporation being therefore the place where the business is carried on, the English decisions on those statutes which make it necessary, for the purposes of county court jurisdiction, to determine where the place of business of the plaintiff or defendant is carried on (b), will afford some assistance in answering the question in individual cases. Thus it has been held that the place of business of a lime, cement, brick, and manure company was at their works in Somersetshire, where the lime, &c., was made, sold, and delivered, and not in London, where the registered office was situate, and the meetings of the directors had been held (c); that a registered company does not "carry on its business" where an agent sells its goods in his own name (d); that the Great Western Railway Company carried on its business at Paddington, the London and North-Western Railway Company at Euston Square, and the Great Northern Railway Company at King's Cross, and not at the minor stations on the line (e); and that the seat of the business of a promenade pier company was in London, where the registered office was situate, and the general business transacted, although the pier, the erection and maintenance of which were the sole objects of the company's existence, and from which the whole revenue of the company was derived, was situate at Aberystwith in Wales (f). And a railway company incorporated under a private Act of the British Parliament for the purpose of making a railway in Ireland, with an office in Westminster for the transaction of business, and no property or effects in Ireland, was held to be a foreign corporation so as to be bound to give security

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(a) 2 Grotius Soc. 70.

(b) *Taylor v. Crowland Gas and Coke Co.* (1855), 11 Ex. 1; 24 L. J. Ex. 233.

(c) *Keynsham Blue Lias Lime Co. v. Baker*, 33 L. J. Ex. 41. But see *Cesena Sulphur Co. v. Nicholson* (1876), L. R. 1 Ex. 428, cited above, with which this case appears scarcely consistent.

(d) *Oldham Building, &c. Co. v. Heald*, 33 L. J. Ex. 236.

(e) *Adams v. Great Western Ry. Co.* (1861), 30 L. J. Ex. 124; 6 H. & N. 404; *Brown v. London and North Western Ry. Co.*, 32 L. J. Q. B. 318; 4 B. & S. 326; *Shiels v. Great Northern Ry. Co.*, 30 L. J. Q. B. 331.

(f) *Aberystwith Promenade Pier Co. v. Cooper* (1865), 35 L. J. Q. B. 44.

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for costs when suing in England (*g*). Whether these decisions are all strictly in concord is not so important as the general conclusion to which they point, that the question where a corporation resides, dwells, has its seat, or carries on its business, is one and the same question of fact, depending for its answer, as does the question of domicile in the case of an individual, upon a review of all the circumstances of the particular case. Notwithstanding certain ambiguous expressions in the case of *The Carron Iron Company v. Maclaren* (*h*), which have been already referred to, it seems probable that this sort of residence is the nearest approach to the domicile of an individual of which the artificial person called a corporation is capable (*i*).

The idea of domicile "by election," which is occasionally introduced into French contracts, is relevant in this connection; but it is hardly more than a figure of speech. A corporation, like an individual, may contract that it shall be dealt with as if it were domiciled in any specified country, or that it will submit to any specified jurisdiction. Having so contracted, it will be held to its agreement; and service of a writ in the manner stipulated for by the contract will be considered valid (*k*). The cases with regard to individuals are analogous (*l*).

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of corpora-
tions.

The conception of nationality, like that of domicile, can only be applied to corporations in a metaphorical sense; but in time of war it may often be necessary to consider it as so applicable. It would appear clear that a corporation is for some purposes to be regarded as a subject of the State by whose law it was incorporated, and in which it is registered and carries on its business. In *Driefontein Consolidated Gold Co. v. Janson* (*m*) all these conditions existed. It is difficult to conceive a corporation as domiciled in one State and belonging by nationality to another, both conceptions being equally artificial in their character. The contention that the nationality of the shareholders in a company affected the question was rejected by Mathew, J., and by Lord Macnaghten in the House of Lords, in the *Driefontein Case*.

(*g*) *Kilkenny, &c. Ry. Co. v. Feilden*, 6 Ex. 81; 20 L. J. Ex. 141; *Edinburgh and Leith Ry. Co. v. Dawson*, 7 Dowl. 573.

(*h*) (1852), 5 H. L. C. 416.

(*i*) See further, as to the meaning of the expression "ordinarily resident" (in connection with service of writs or notices on persons or corporations out of the jurisdiction—R. S. C. Ord. xi. r. 1), *Ghikis v. Musurus* (1909), 25 T. L. R. 225; *Allison v. Independent Press Cable Association of Australasia, Ltd.* (1911), 28 T. L. R. 128, C. A.; *Actiesselskabet Dampskib "Hercules" v. Grand Trunk Pacific Ry. Co.*, [1912] 1 K. B. 222, C. A.

(*k*) *The Tharsis Sulphur Co. v. La Société des Métaux* (1889), 58 L. J. Q. B. 435.

(*l*) *Copin v. Adamson*, (1874), L. R. 1 Ex. D. 17; *Vallée v. Dumergue* (1849), 4 Ex. 290; *infra*, chap. xi.

(*m*) [1900] 2 Q. B. 339, 346; S. C., [1902] A. C. 484, 490.

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Just as opinion has been divided upon the question of the location of the domicile of a corporation, so it has been divided upon the question of its nationality. Although there was no actual pronouncement upon the status of the corporation in *Daimler Co., Ltd. v. Continental Tyre and Rubber Co. (Great Britain), Ltd. (n)*, this question may be said to have been definitely settled by the judgment of the House of Lords in this case. The respondent company was incorporated under the Companies Acts, with its registered office in London. Its object was the sale in the United Kingdom of tyres made in Germany by a German company. At the date of the writ against the Daimler Co. for moneys due all the shares were held by the German company and German subjects except one held by the secretary, Wolter, who was born in Germany and was naturalized in the United Kingdom in 1910. All the directors were German subjects and all prior to the writ resident in Germany. Wolter claimed that he had authority to issue writs in the United Kingdom but no evidence of this was produced. It was unanimously held by the House of Lords that Wolter had no authority to institute these proceedings, and that the action was irregular and ought to be struck out. Although unnecessary for this decision, Lord Parker thought the law might be summarised in the following propositions :—

“(1) A company incorporated in the United Kingdom is a legal entity, a creation of law with the status and capacity which the law confers. It is not a legal person with mind and conscience. To use the language of Buckley, L.J., ‘it can neither be loyal nor disloyal. It can neither be friend nor enemy.’

“(2) Such a company can only act through agents properly authorised, and so long as it is carrying on business in this country through agents so authorised and residing in this or a friendly country, it is *prima facie* to be regarded as a friend and all His Majesty’s lieges may deal with it as such.

“(3) Such a company may, however, assume an enemy character. This will be the case if its agents or the persons in *de facto* control of its affairs, whether authorised or not, are resident in an enemy country or, wherever resident, are adhering to the enemy or taking instructions from or acting under the control of enemies. A person knowingly dealing with the company in such a case is trading with the enemy.

“(4) The character of individual shareholders cannot of itself affect the character of the company. This is admittedly so in times of peace, during which every shareholder is at liberty to

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exercise and enjoy such rights as are by law incident to his status as a shareholder."

It would be anomalous if it were not so also in time of war during which all such rights and privileges are in abeyance. The enemy character of individual shareholders and their conduct may, however, be very material on the question whether the company's agents or the persons in *de facto* control of its affairs are in fact adhering to, taking instructions from or acting under the control of enemies. . . .

"(5) In a similar way a company registered in the United Kingdom but carrying on business in a neutral country through agents properly authorised and resident here, or in the neutral country, is *primâ facie* regarded as a friend, but may, through its agent or persons in *de facto* control of its affairs, assume an enemy character.

"(6) A company registered in the United Kingdom but carrying on business in an enemy country is to be regarded as an enemy."

These principles were followed in subsequent cases. In *The Polzeath* (p), Bargrave Deane, J., said: "To decide the true character and entity of a business or company, you must ascertain where the motive or directing force of the business or company comes from; in other words, where the real life is, and not where the limbs move to give effect to that living power." And in the Court of Appeal it was said that the principal place of business must be "the centre from which instructions were given and control exercised over the employees and the business of the company." In the case of *In re Hilkes, Ex parte Muhesa Rubber Plantations* (q) the company was registered in England and all the directors, the secretary, and the majority of the shareholders in number and value were English. The main business of the company was the exploitation of a rubber estate in German East Africa, which up to 1911 was managed by Hilkes, a German subject, as their agent. Horridge, J., held that it was a company carrying on business in an enemy country. Upon appeal Lord Cozens-Hardy, M.R., said it was necessary to see where was the control of the company. What had been called the brain and heart of the company—the control of the company—were all undoubtedly resident in London. If Mr. Justice Horridge's decision meant that a company which was in all other respects English, but happened to have a commercial agent in an enemy country doing business in an enemy country is thereby constituted an enemy company, that seemed inconsistent with the principles laid down in the *Daimler* and *De Beer*

(p) [1916] P. 117; *ibid.* 241.

(q) [1917] 1 K. B. (C. A.) 48.

Cases. He could not say that the fact that a British company did business in an enemy country and had an agent there, turned it into an enemy company. The same principles were adopted in France. In *Société Conserve Lenzburg* (r) the Court of Cassation found that it was entitled "to go to the bottom of things and ascertain whether it was a French company in reality or such only in appearance." But in the United States the separate entity theory prevailed throughout the war. In *Fritz-Schultz Co. v. Raimes Co.* (s) the Court regarded a corporation as an entity separate and apart from its corporators, and not merely as an association of individuals, and would not regard the domicile or character of the corporators. The corporators are presumed to be citizens of the same State as the corporation (t).

Foreign corporations, when once they have become litigants in an English Court, occupy the same position as natural individual persons; and their peculiar nature is not allowed to deprive their opponent of any of the ordinary rights incidental to litigation. Order xxxi. r. 5 of the schedule to the Judicature Act provides that if any party to an action be a body corporate or any other body of persons, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply at chambers for an order allowing him to deliver interrogatories to any member or officer of such corporation or body of persons, and an order may be made accordingly. Whether a foreign corporation, incorporated by foreign and not by English law, was included under the general term *corporation* might perhaps have been disputed; but it has been sufficiently shown that it is at any rate a "body of persons empowered by law to sue or be sued," and it therefore clearly comes within the latter part of the rule. But it has recently been held that in the case of a foreign partnership, as distinguished from a foreign corporation, service on the manager of the London agency under Order ix. r. 6, is insufficient (u). The same rule has been applied to the case of a foreign republic, in a case (x) from which it appears that where the foreign corporation or State is plaintiff, all proceedings may be stayed until a proper person is named on its behalf to give discovery (y).

The liability of members of a foreign corporation, if sued in the United Kingdom, will be determined by the law of the State

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(r) Journ. de Droit Intern. (Clunet) 1915, p. 1164.

(s) 164 N. Y. S. 454 (1917).

(t) For discussion on this subject, see Schuster, 2 Grotius Soc. 57.

(u) *Russell v. Cambefort* (1889), 23 Q. B. D. 526. Followed in *St. Gobain v. Hoyerman's Agency*, [1893] 2 Q. B. 96.

(x) *Republic of Costa Rica v. Erlanger* (1875), L. R. 1 Ch. D. 171.

(y) As to the right of a foreign shareholder in an English company to oppose winding-up petition without giving security for costs, see *Re Percy, &c. Co.*, L. R. 2 Ch. D. 531.

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under which the corporation was constituted. If by the constitution of the company the members are wholly irresponsible, or responsible only to a limited extent, the same liability will attach to them in this country (z). When the company is not incorporated and must therefore be regarded as a mere association of individuals, the question must be treated as one of agency. For this purpose it would appear that the foreign law would be material only on the question of the authority given; and that for other purposes, the liability of the individuals composing the association would be determined by the law of the place where they acted or contracted by their agent. The subject does not appear to have been practically discussed (a).

PARTNERSHIPS.

Partnerships, or unincorporated associations of individuals for the purpose of carrying on business in common, may by English law sue and be sued in the name of the firm (Judicature Act and Rules, June, 1891, Order XLVIII. (a) r. 1). By the terms of the rule cited, a partnership for this purpose consists of "any two or more persons claiming or being liable as co-partners *and carrying on business within the jurisdiction.*" The words in italics were added in 1891 (June 19th) to the former rule of 1883, and the decisions on this subject prior to that date cannot therefore be accepted without examination (b). The words of this rule are wide enough to include all persons carrying on business within the jurisdiction, whatever their domicile, nationality, or residence; and Order XLVIII. (a) rr. 3 and 8 seem to show that it was intended to have a general application. In *Grant v. Anderson* (c), however, an opinion was expressed by Wright, J., that the rule was not applicable to foreigners resident abroad; but the Court of Appeal refused to indorse this ruling, and dismissed the appeal on another ground. It has since been expressly decided by the Court of Appeal that the rule is so applicable, whether the partners reside within the jurisdiction or not, and whether their nationality is foreign, British or colonial (d). The only condition now to be considered is whether the firm carries on business

(z) *General Steam Nav. Co. v. Guillo* (1843), 11 M. & W. 877; *Bateman v. Service* (1881), 6 A. C. 386; *Lindley on Companies*, 6th ed. (1902), 1227.

(a) *Lindley on Companies, l.c.*, Story's *Conflict of Laws*, § 320 (a); *Maunder v. Lloyd*, 2 J. & H. 718.

(b) *Russell v. Cambefort* (1889), 23 Q. B. D. 526; *Western National Bank of N. York v. Perez & Co.*, [1891] 1 Q. B. 304; *Heinemann v. Hale*, [1891] 2 Q. B. 83; *Dobson v. Festi*, [1891] 2 Q. B. 92, were cases decided under the old rule, and cannot now therefore be relied on. The cases of *Shepherd v. Hirsch*, 45 Ch. D. 231, and *Lysaght v. Clark*, [1891] 1 Q. B. 551, are also out of date, but appear in consonance with the new rule.

(c) [1892] 2 Q. B. 108.

(d) *Worcester City Banking Co. v. Firbank & Co.*, [1894] 1 Q. B. 784.

within the jurisdiction. If this condition is not satisfied, the writ must be issued in the names of or against the individual partners; and leave must be obtained to serve the writ or notice of writ abroad if necessary (e).

Whether a partnership is a corporation depends on the law of the country in which it is formed (*Von Hellfeld v. Rechnitzer*, [1914] 1 Ch. (C. A.) 748).

Carrying on business within the jurisdiction.—This must be a question of fact. In ordinary cases it will be established by showing that there is within the jurisdiction a place of business held in the name of the firm, where business is carried on by a partner, or by a paid employé of the firm, on its account. But “it may be one thing to carry on business within the jurisdiction and another to have a place of business within the jurisdiction” (f). And a place of business bearing the firm name, but managed by an agent, and not a servant of the firm, has been held insufficient (g).

An individual foreigner carrying on business within the jurisdiction under a firm name, is not within R. S. C. Order XLVIII. (a) r. 1, and he must be sued in his own name, and served with notice of the writ if abroad, or personally if service can be effected in this country (h).

A foreign firm not carrying on business within the jurisdiction may by agreement be bound to accept service within the jurisdiction, and such service will be good (i). And a foreign firm suing in an English Court as plaintiff is bound to submit to the jurisdiction of the Court in respect of any counter-claim raised against it (k).

The jurisdiction of the Court to dissolve a partnership carrying on business within the United Kingdom must, it is conceived, depend upon the domicile, or at any rate, the residence, of the partners against whom dissolution is sought. The mere fact that the firm had a place of business in England where it traded by its servants would be insufficient.

(e) *Indigo Co. v. Ogilvy*, [1891] 2 Ch. 31. Rules of Sup. Court, Ord. xi. Lindley on Partnership, 8th ed. (1912), p. 320.

(f) Per Esher, M.R., *Worcester Banking Co. v. Firbank*, [1894] 1 Q. B. 784, 788. See *Baillie v. Goodwin* (1886), 33 Ch. D. 604; *Heinemann v. Hale* [1891] 2 Q. B. 83; *Grant v. Anderson*, [1892] 2 Q. B. 108.

(g) *Baillie v. Goodwin* (1886), 33 Ch. D. 604; *Ockura & Co. v. Forsbacka*, [1914] 1 K. B. 715.

(h) *St. Gobain v. Hoyerman's Agency*, [1893] 2 Q. B. 96; cf. on this point *Russell v. Cambefort* (1889), 23 Q. B. D. 526, over-ruling *O'Neil v. Clason* (1876), 46 L. J. Q. B. 191. See as to service in this country, *Carrick v. Hancock* (1895), 12 T. L. R. 59.

(i) *Montgomery v. Liebenthal*, [1898] 1 Q. B. D. 87. But neither a person nor a firm can by agreement give increased power to order service out of the jurisdiction; *British Wagon Co. v. Gray*, [1896] 1 Q. B. 45.

(k) *Griendtvooven v. Hamlyn & Co.*, 8 T. L. R. 231.

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As to bankruptcy, it is enacted by the Bankruptcy Rules, 1915, r. 288, that no order of adjudication shall be made against a firm in the firm name, but it shall be made against the partners individually. And it has been decided that an English Court has no jurisdiction to make an adjudication of bankruptcy against a foreigner domiciled and resident abroad, and not served in England, though he is a member of a partnership trading in England, some of the partners in which were British subjects residing in England (l). In such a case, therefore, the property of foreign partners cannot be made available, except by taking proceedings against such partners in the country where they reside. If there are assets in this country, the fact that bankruptcy proceedings have been already commenced abroad is no bar to proceedings here, except perhaps as to such of the partners as are domiciled in the country where bankruptcy proceedings were first commenced (m).

(ii.) FOREIGN STATES AND SOVEREIGNS.

Personality
of States.

With regard to any particular municipal law, a foreign State must be regarded as occupying a position closely analogous to that of a foreign corporation; the personality of the latter being conferred upon it by its own municipal law, while that of the former is created by the public law of nations. "Every Government," says Lord Cranworth, "in its dealings with others necessarily partakes in many respects of the character of a corporation. It must, of necessity, be treated as a body having perpetual succession. It would not be represented by all or any of the individuals of whom it is from time to time composed. With respect to the provisional Government, during the time of the transactions in question, material changes took place as to the persons who from time to time exercised its functions. It is impossible to say that the defendants ever were agents of all or any of the individuals who from time to time composed that Government. Those who, as constituting the Government, stood, if they did stand, in the relation of *cestuis que trust* or of principals towards the defendants ceased to fill that character when they ceased to be members of the Government; so that, the executive Government being now at an end, either the defendants have ceased to fill the character of trustees or agents at all, or they have become trustees or agents for the plaintiff, as the person now in possession of the supreme authority. The case may be likened to that of a person who had property in his

(l) *Ex parte Blain, Re Sawers* (1879), 12 Ch. D. 522.(m) *Ex parte Châle, Re Artola Hermanos* (1890), 24 Q. B. D. 640; Lindley on Partnership, 8th ed. (1912), p. 646. Cf. *Emanuel v. Symon*, [1907] 1 K. B. 235; [1908] 1 K. B. 302; *Re Anderson*, [1911] 1 K. B. 896.

hands entrusted to him by a corporation" (n). The passage just cited shows that the analogy between a corporation and a State may be pushed even further. When the Government in possession of the supreme authority assumes a democratic or republican form, the State occupies the position, with regard to foreign municipal law, of a corporation aggregate. When the constitution of the State is monarchical, the Sovereign is regarded as a corporation sole. Until comparatively modern days, the maxim of the French despot, "*L'Etat, c'est moi*," was so far true that the Sovereign was universally regarded as the essential representative of the State over which he ruled; and it was well settled that a foreign Sovereign could sue in an English Court long before the personality of a republic or confederation of States came in question (o). Nor is the admitted right of a foreign Sovereign to sue confined either to his own private and personal injuries, or even to the rights of property which are vested in him by the law of his State. He is the representative of his nation, and may sue in respect of all public political rights which belong to him as such, whether they are, for internal purposes, vested in him, or in some legislative or representative body of the State (p). And so soon as a *de facto* Government, whether revolutionary or not, is recognised by foreign Governments, it would seem to acquire all the rights and liabilities of its predecessor, which it is capable of transmitting in like manner. Thus a private subject may safely contract with a *de facto* Government of a foreign State which his own Government has recognised (q). Even where a *de facto* Government has never been recognised by the Government of a private individual who contracts with it, the Government which succeeds to the *de facto* Government cannot displace the rights acquired by the individual who so contracts. Thus, where the Confederate States of America had sent goods held by them as public property to England under a contract, it was held that the United States could not, after the Civil War was over, repudiate the contract and recover the goods (r).

The question whether a particular government, tribe, or other association is or is not an independent sovereign State, is one which the Court in England will answer for itself, taking judicial cognisance of the facts that are within the knowledge of the

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(n) *King of Two Sicilies v. Wilcox* (1851), 20 L. J. Ch. 417, 420; 1 Sim. (N.S.) 301.

(o) Rolle, Abridgment, tit. "Admiralty," E. 3; *King of Spain v. Hullett* (1828), 1 Dow. & Cl. 169; *Nabob of Arcot v. East India Co.* (1793), 3 B. C. C. 291; S. C. 4 B. C. C. 180; *Emperor of Brazil v. Robinson* (1838), 1 Dowl. P. C. 522.

(p) *Emperor of Austria v. Day* (1861), 2 Giff. 628.

(q) *Republic of Peru v. Dreyfus* (1888), 38 Ch. D. 348. Cf. *United States of America v. McRae* (1867), L. R. 8 Eq. 69.

(r) *United States of America v. Prioleau* (1865), 2 H. & M. 559.

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Crown (s). If necessary, the Court itself applies (through the Foreign Office) to the Crown for information (t), and whether or not it is correct to say that the Court will also take judicial cognisance of the territorial boundaries (for the purposes of jurisdiction or otherwise) of a foreign State, it has been held to be required by considerations of State policy that the Courts should act in unison with the Crown in dealing with such matters (u). In accordance with this principle, the same mode of ascertaining the facts by inquiry from the Foreign Office was adopted by Wright, J., in *Mighell v. Sultan of Johore*.

This principle of recognition was approved by the Court of Appeal in *The Gagara*, [1919] P. 95, where the Attorney-General, on behalf of the Foreign Office, stated that H.M.'s Government had for the time being and with all necessary reservations as to the future, recognised the Estonian National Council as a *de facto* independent body. In *The Annette; The Dora*, [1919] P. 105, where at the request of Hill, J., for information, the Secretary of State for Foreign Affairs, in a letter to the Admiralty Marshall, stated that the Provisional Government of Northern Russia, was merely provisional in nature, and had not been formally recognised by H.M.'s Government. Hill, J., refused to infer from this statement that it had been "informally recognised" as a sovereign State. In *Duff Development Co., Ltd. v. Government of Kelantan and the Crown Agents for the Colonies*, [1923] 1 Ch. 385, Russell, J. held that, where the status of a State is disputed, a letter, supported by documents from a Secretary of State, has the same effect as a communication from the King, and therefore conclusive, and the Court would accept it without considering whether it is justified by the documents appended to it. It was further held that although the Government of Kelantan (which was declared to be an independent sovereign State) had by initiating proceedings to set aside the award of the arbitrator submitted to the jurisdiction of the Court, nevertheless such submission had not the effect of rendering any property belonging to the Government of Kelantan within the jurisdiction of the Court, liable to execution. Upon appeal, this judgment was affirmed. Lord Sterndale, M.R., who, after stating that there was no direct authority for the contention that submission to the jurisdiction implied submission to execution, came to the con-

(s) *Emperor of Austria v. Day* (1861), 30 L. J. Ch. 690; *Thompson v. Powles* (1828), 2 Sim. 194; *City of Berne v. Bank of England* (1804), 9 Ves. 347. So as to the existence of war with a foreign State, *R. v. De Berenger* (1814), 3 M. & S. 67.

(t) *Taylor v. Barclay* (1828), 2 Sim. 213; 7 L. J. Ch. 65; *The Charkieh* (1873), L. R. 4 A. & E. 59; *Mighell v. Johore (Sultan of)*, [1894] 1 Q. B. 149.

(u) *Foster v. Globe Venture Syndicate*, [1900] 69 L. J. Ch. 375.

clusion that there is no necessary implication at all that the Sovereign by such submission to the jurisdiction also says, "And not only will I submit to that, but I will submit all my property and my person to such consequences as are necessary to judgment given by that Court." That would be a very serious matter, and he did not think such a submission should be implied unless there is some authority pointing in the direction of its being necessary to imply it. In upholding the judgment of the Court of Appeal, a distinction was made in the majority judgment of the House of Lords. It was held that the Government of Kelantan, by agreeing to an arbitration clause in a contract and by applying to set aside an award in an arbitration under the contract, had not made submission to the Court itself so far as the enforcement of the award was concerned. As Lord Cave pointed out, the Government by its application, endeavoured to get rid of the award and left it to the Court to decide its rights in this respect; but the application for leave to enforce the award is a new procedure and although connected with the earlier application, is distinct from it. Consequently the question whether a foreign Sovereign who submits to judgment thereby submits to execution under the judgment upon his property in this country did not arise for decision. From this judgment, Lord Carson dissented. See [1924] A. C. 797.

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In *Compania Mercantil Argentina v. United States Shipping Board*, 40 T. L. R. 601 (1923), it was declared by the Court of Appeal that no authority was to be found for the proposition that a sovereign State or one of its departments engaging in some private trading business is thereby subjected to legal process in the Courts of a foreign country. It was also held that a great deal more than a submission to arbitration was required to amount to waiver of immunity of a Sovereign when he is sued in a Court of law *in personam*. The fact, said Bankes, L.J., that the United States Shipping Board were willing, at any rate, for a time, to proceed to arbitration did not seem to him to show that they waived their immunity from process by action.

A distinction may no doubt be drawn between a government *de jure* and one *de facto*; but, said Bankes, L.J., in *Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co.*, [1921] 3 K. B. 532, for the purposes of this case no distinction can be drawn. The British Government having recognised the Soviet Government as the Government really in possession of the powers of sovereignty in Russia, the acts of that Government must be treated by the Courts of this country with all the respect due to the acts of a duly recognized foreign State.

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In *The Jupiter*, 40 T. L. R. 815 (1924), where the plaintiff company issued a writ *in rem* against the ship, and the Union of Soviet Republics entered an appearance under protest, it was held by the Court of Appeal, affirming Hill, J., that since the Soviet Government had been recognised by the British Government *de jure* and *de facto*, and declined to submit to the jurisdiction of the Court, the latter had no jurisdiction, and the writ must be set aside.

It is of course obvious that a foreign Sovereign cannot sue in respect of an international wrong—*i.e.* an injury done by one State to another. The only redress for such an injury as that lies in diplomacy or war; but whenever either the private property of the Sovereign, or the public property of the State of which he is the impersonation, is injured by a private individual belonging to another State, the tribunals of that State are available to repair the wrong (*x*). It appears, however, to have been laid down as a rule by the House of Lords in *Hullett v. King of Spain*, and adopted by the Court of Chancery in *The Emperor of Austria v. Day*, that the dignity of such a plaintiff is not to be disparaged by giving him costs.

It has been already stated that the interpretation clause in the schedule to the Judicature Acts includes in the word “person,” in the construction of the Rules of the Court, corporations and bodies politic (Order LXXI. r. 1, schedule to Judicature Acts, 1873 and 1875); language which in itself points to a distinction between ordinary foreign corporations and those greater international personalities which are commonly called States, and is probably borrowed from language used by Lord Hatherley in a well-known modern case (*y*), in which the principle that such bodies politic have a right to sue was eventually laid down by the Court of Appeal (*z*).

Right of
foreign
State to sue.

It will be seen that the only difficulty in recognising the right of a foreign State to sue in an English Court, as distinguished from the Sovereign of such a State, arose from the simple fact that a State had not, on the ordinary principles of law, any individuality which entitled it to the rights of a natural person—in other words, it was neither a natural person nor an artificial

(*x*) *King of Two Sicilies v. Wilcox* (1851), 1 Sim. (N.S.) 301; *Hullett v. King of Spain* (1828), 1 Dow. & Cl. 169; *Emperor of Austria v. Day* (1861), 2 Giff. 628. The public property of a foreign Sovereign, transiently present in this country, cannot be interfered with or attached by an English Court; and such Sovereign will be able to obtain an order allowing him to remove it, though an injunction restraining other persons from doing so has been granted; *Vavasseur v. Krupp* (1878), 9 Ch. D. 351; 39 L. T. 437. A foreign Sovereign does not waive or lose his rights in this respect by submitting to be made a party in order to apply to the English Court: *ibid.*; cf. *infra*.

(*y*) *United States of America v. Wagner* (1867), L. R. 3 Eq. 724, 731.

(*z*) S. C. 2 Ch. 582.

person, such as a corporation. In other respects, the arguments in favour of the right of a Sovereign to sue in his representative character applied with equal force to the right of a nation living under a democratic form of government. "I have no doubt," says Lord Redesdale, "but a foreign Sovereign may sue in this country; otherwise there would be a right without a remedy. He sues here on behalf of his subjects; and if foreign Sovereigns were not allowed to do that, the refusal might be a cause of war" (a). A plausible objection was, however, raised to the right of a State to sue in its own impersonal name, on the ground that such a plaintiff would be able to sue without naming any person to act on its behalf, or to comply with the ordinary requisitions of justice in the progress of the suit, thus obtaining an advantage which no other suitor could secure (b). This difficulty has, however, been overcome in the case of an ordinary foreign corporation for trading purposes by making the secretary or other officer a party for the purpose of discovery, the Court assuming that such officer is under the control of the corporation (c); but it was at first regarded as an insuperable bar to an action by a corporate State not represented by a Sovereign. Thus, in *The Columbian Government v. Rothschild* a demurrer was allowed to a bill brought by the Columbian Government in that name. "A foreign State," said Sir J. Leach, "is as well entitled as any individual to the aid of this Court in the assertion of its rights, but it must sue in a form which makes it possible for this Court to do justice to the defendants. It must sue in the names of some public officers who are entitled to represent the interests of the State, and upon whom process can be served on the part of the defendants, and who can be called upon to answer the cross bill of the defendants. This general description of the 'Columbian Government' precludes the defendants from these just rights; and no instance can be stated in which this Court has entertained the suit of a foreign State by such a description" (d). This decision was recognised by the House of Lords in *King of Spain v. Hullett* and *Hullett v. King of Spain* (e), and followed by V.-C. Page Wood (Lord Hatherley) in 1867; but his judgment was expressly reversed by the Court of Appeal, and *The Columbian Government v. Rothschild* distinguished. "The dictum," said Lord Chelmsford, "that a foreign State must sue in the name of some public officers who are entitled to represent

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 (a) *Hullett v. King of Spain* (1828), 1 Dow. & Cl. 174.

 (b) *United States of America v. Wagner* (1867), L. R. 3 Eq. 724, 731; *Columbian Government v. Rothschild* (1826), 1 Sim. 94.

 (c) *Collins Co. v. Brown* (1857), 3 K. & J. 422; *Wyck v. Meal*, 3 P. Wms. 311.

(d) (1826), 1 Sim. 94, 103.

(e) (1828), 7 Bl. (N.S.) 359; 2 Bl. (N.S.) 31.

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the interests of the State must have referred to some persons or body in whom the interests of the State were vested, and who were, therefore, entitled to represent it in a suit. There was nothing upon the face of the bill to indicate whether the Government of Columbia was such a body, or, indeed, of whom it was composed; so that, if the defendants had been desirous of filing a cross bill, they would have been wholly unable, from information contained in the original bill, to know upon whom process should be served. . . . I do not see what injustice can be done by permitting the United States of America to proceed in this case in their own name. . . . If the defendant wishes to obtain a discovery, and files a cross bill for that purpose, he may apply to the United States to name some person from whom the discovery sought for may be obtained, and if they refuse to furnish him with this information, the Court will be justified in staying the proceedings in the suit until the defendant's demand is complied with" (f). And Lord Cairns said, in the same case, that nothing could be more unreasonable than to suppose that Sir J. Leach meant, in *The Columbian Government v. Rothschild*, to decide, and to decide for the first time, that a republic could not sue in its own name, but must have, or must create, some officer to maintain a suit on its behalf. But there is no rule that the person suing in respect of the public property or interest of a State must be a monarch, republic, or other titular representative; and where a contract was made with the Spanish Minister of Marine (*ex nomine*) it was held that the Spanish Minister of Marine for the time being could sue upon such contract (g).

The principle, then, that a State not represented by a Sovereign may nevertheless sue in its own name in English Courts, as a personality created by the law of nations, must be taken as settled, and has been followed in several subsequent cases (h). This intangible personality does, in fact, occupy exactly the same position in a republic that the Sovereign holds in a monarchy. The Sovereign, in a monarchical form of government, may, as between himself and his subjects, be a trustee for the latter, more or less limited in his powers over the property which he seeks by action to recover. But in the Courts of a foreign State, as in diplomatic intercourse with the Government of a foreign State, it is the Sovereign, and not the State, or the

(f) *United States of America v. Wagner* (1867), L. R. 2 Ch. 582, 589. This procedure was actually followed in *Republic of Peru v. Weguelin* (1875), L. R. 20 Eq. 140. The person named should have been made defendant in a cross suit under the old practice; see now Judicature Acts, Order xxi. r. 4.

(g) *Castaneda v. Clydebank Engineering Co.*, [1902] A. C. 524.

(h) *Republic of Liberia v. Imperial Bank* (1873), L. R. 16 Eq. 179; 9 Ch. 569; *Republic of Costa Rica v. Erlanger* (1875), L. R. 19 Eq. 33; *Republic of Peru v. Weguelin* (1875), L. R. 7 C. P. 352; 20 Eq. 140.

subjects of the Sovereign, that is recognised. From him, and as representing him individually, and not his State or kingdom, is an ambassador received. In him individually, and not in a representative capacity, is the public property assumed by all other States, and by the Courts of all other States, to be vested. In a republic, on the other hand, the sovereign power, and with it the public property, is held to remain and to reside in the State itself, and not in any officer of the State. It is from the State that an ambassador is accredited, and it is with the State that the diplomatic intercourse is conducted (i). The right to the public property of the State must draw with it the right to sue for that property, and to enforce the *choses in action* which are a part of it. Hence the only difficulty in the way of recognising the right of a State to sue in its own name could never have been more than a technical one, the proper method of overcoming which has already been indicated (k).

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The liability of a foreign State or Sovereign to be sued in the tribunals of another country rests of course upon very different principles. A Sovereign or a sovereign State who submits to the jurisdiction of a foreign tribunal for the purpose of obtaining relief does, of course, by asking its assistance, impliedly waive any sanctity or protection which the law of nations gives him or it, and stands, with reference to the procedure and practice of the Court, in the position of an ordinary litigant (l). But this is only for the purposes of the suit; and therefore, though a Sovereign so suing submits to the jurisdiction so far as any bill of discovery, defence, set-off, or counter-claim in the nature of set-off is concerned, he does not submit to the jurisdiction generally, so as to be liable to an independent counter-claim or cross action. The test appears to be whether the counter-claim is a matter which ought to be entertained so as to do justice in the original action. Thus, when a foreign sovereign State brought an action in England against concessionnaires of a railway for the purpose of appointing new trustees, a counter-claim for moneys payable under the concession was struck out (m). So a counter-claim for libel was struck out, in a similar action (n). In both the

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(i) Per Lord Cairns, in *United States of America v. Wagner* (1867), L. R. 2 Ch. 582, 593.

(k) *Republic of Peru v. Weguelin* (1875), L. R. 20 Eq. 140.

(l) *Hullett v. King of Spain* (1828), 4 Russ. 225, 560; 1 Dow. & Cl. 169; 1 Cl. & F. 333; 7 Bl. (N.S.) 359; *Duke of Brunswick v. King of Hanover* (1844), 6 Beav. 1. As to the position of a foreign Sovereign when plaintiff, and his liability to give security for costs to a defendant who counterclaims in an Admiralty action, see *The Newbattle* (1885), 10 P. D. 33, and *infra*.

(m) *S. A. Republic v. Transvaal Northern Ry. Co.*, [1898] 1 Ch. 190; 67 L. J. Ch. 92.

(n) *S. A. Republic v. Compagnie Franco-Belge, &c.*, [1897] 2 Ch. 487; 66 L. J. Ch. 747.

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cases cited, it was said that the counter-claim was so foreign to the subject-matter of the action that it would have been inconvenient in any case; but the principle was nevertheless clearly laid down. Even where a proposed counter-claim would have been otherwise sufficiently connected with the action, it has been held that it was excluded by the treaty provisions between the British and Japanese Governments, and the Orders in Council made in consequence (o).

There is not, however, any authority for holding that a foreign Sovereign who has not so submitted himself to the jurisdiction of a Court of another country may be sued or made amenable in it; and if such an action was nominally maintainable, the judgment of the Court in it could not, of course, be executed without a breach of public international law, and the danger of incurring war. In *Calvin's Case* (p) it is indeed said that if a King of a foreign nation come into England, by the leave of the King of this realm (as it ought to be), he shall sue *and be sued* by the name of a King; but the object of the *dictum* is to show, not that a foreign Sovereign may be sued, but that a foreign Sovereign carries his dignity with him into England, and is a King there as much as in his own realm. Nor is there any instance cited to support the principle except a *dictum* from a case decided in 11 Edw. 3 (q), that if a man bring a writ against Edmond Baliol, and name him not King of Scotland, the writ should abate. Edmond Baliol was, of course, a feudatory of the Crown of England, and not a foreign Sovereign at all in the modern meaning of the term. The case referred to by Selden (r), where the King of Spain was outlawed for not appearing in a suit, or paying the costs which had been adjudged against him, shows, in effect, that a foreign Sovereign cannot practically be sued unless he submits to the jurisdiction. The King of Spain not having appeared, there could of course be no demurrer; and it would in fact have been impossible to have obtained the fruits of the judgment, which seems to have been given against him by default, had it not been for the fact that he had submitted to the jurisdiction so far as to bring other suits, which were then pending, against English merchants. By the process of outlawry, he could of course be prevented from prosecuting these, and this questionable course had therefore the effect of inducing him to pay the costs that were claimed, that he might be allowed to

(o) *Imperial Japanese Government v. P. & O. St. Nav. Co.*, [1895] App. Cas. 644; 64 L. J. P. C. 107.

(p) (1608), 7 Co. 15 b.

(q) Cited Moore Rep. 803.

(r) Selden's Table Talk, "Law," 3. See Lord Campbell's remarks on this case, impeaching its authority, in *De Haber v. Queen of Portugal* (1851), 17 Q. B. 211.

maintain the other actions he had brought in English Courts. In *Hullett v. King of Spain* (s) a cross bill was no doubt held to be maintainable against a foreign Sovereign; but there the King of Spain had by his original bill submitted to the jurisdiction, and therefore rendered himself subject to the control of the Court and liable to the rules of practice (t). In *Duke of Brunswick v. King of Hanover* the subject was carefully considered by Lord Langdale, who laid down that although in many instances sovereign princes, for the sake of having a claim or right determined, might have been afforded an opportunity of appearing, and might have voluntarily appeared, as defendants before the tribunals of this country, yet that it did not appear how a foreign prince could be effectually cited, nor what control an English Court could have over him or his rights; and further that no case had been cited before him in which it had been determined that a foreign Sovereign, not himself a plaintiff or claimant, but insisting upon his alleged right to be exempt from the jurisdiction, had been held bound to submit to it. "On the whole," said Lord Langdale, "it ought to be considered as a general rule, in accordance with the law of nations, that a sovereign prince, resident in the dominions of another, is exempt from the jurisdiction of the Courts there" (u).

It has, however, happened that the characters of Sovereign and subject have at the same time existed in the same person, in which case the test of liability has been whether the action was brought in respect of transactions entered into in the capacity of the Sovereign or of the subject. Thus, in the case just cited, where the King of Hanover was also a British peer resident in England, it was held that, being a subject of the Crown, he was liable to be sued in the Courts of this country in respect of any acts and transactions done by him, or in which he might have been engaged, as such subject, but not for any acts done by him as King of Hanover, or in his character of a sovereign prince (x). It was added, that where there was a doubt as to the capacity or character in which any particular act was done, it ought to be presumed, *prima facie*, that it was done in the capacity of the

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Sovereign
and private
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(s) (1828), 1 Cl. & F. 354.

(t) So where a foreign Sovereign appears as plaintiff in an Admiralty action for damage by collision, he can be ordered to give security for damages (under 24 Vict. c. 10, s. 34) to a defendant who counterclaims: *The Newbattle* (1885), 10 P. D. 33. Cf. *Republic of Costa Rica v. Erlanger* (1875), 3 Ch. D. 62.(u) *Duke of Brunswick v. King of Hanover* (1844), 6 Beav. 1, 51. See the older cases of *Barclay v. Russell*, 3 Ves. 431; *De la Torre v. Bernales*, cited 5 Beav. 21. Cf. *Statham v. Statham* (1912), 28 T. L. R. 180, where an Indian Prince, falling within the class referred to in s. 18, sub-s. 5, of the Interpretation Act, 1889, and recognised as a reigning Sovereign to the extent of being immune from the jurisdiction of an English Court, was sued as a co-respondent in a divorce suit and was, on his application, struck out of the proceedings.

(x) (1844), 6 Beav. 1, 57.

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Sovereign. Similarly, in *Moodalay v. Morton* (y), Lord Kenyon says: "I admit that no suit will lie in this Court against a sovereign Power for anything done in that capacity, but I do not think the East India Company is within the rule. They have rights as a sovereign Power; they have also duties as individuals; if they enter into bonds in India, the sums secured may be recovered here. So in this case, as a private company they have entered into a private contract to which they must be liable." The case of *The Nabob of Arcot v. The East India Company* (z), according to the note to the report, does not seem to have been decided exactly with reference to the general liability of the defendants to an action, but rather on the ground that the transaction, in respect of which they were sued, was a matter of political discussion; but this appears to be no more than evidence that the company had, in that transaction, acted in their political or sovereign capacity, and not in the character of a private trading company or corporation. The judgment, which is extremely short, is put on the ground that the circumstance of the defendants being subjects of the Crown was immaterial, inasmuch as the plaintiff had treated with the East India Company in the transaction, as with an independent Sovereign. In other words, a person or personality, in whom the characters of Sovereign and subject are united, is liable to an action in English Courts for all acts or contracts entered into in his private capacity, but not in respect of transactions in which he has been engaged as the sovereign impersonation of a State. These cases, however, are now apparently overruled by the modern decisions of *Mighell v. Sultan of Johore* and *The Parlement Belge*, presently cited. In the former of these cases the alleged cause of action was breach of promise of marriage, which was certainly an extreme case of a contract made in a private, as distinguished from a political, capacity; but it was held by the Court of Appeal that there was no jurisdiction.

Waiver of
sovereign
character.

Further, even when the alleged sovereign Power does not also bear the character for certain purposes of the subject of another Sovereign, it has been contended that the privilege of independent sovereignty may be waived by the fact that trade has been carried on by the Sovereign in the apparent character of, and subject to the same conditions as, a private individual. In the case of *The Swift* (a) it was argued that the old Navigation Laws (15 Car. 2, c. 7), which prohibited the conveyance of European produce from one colony in America to another, were binding

(y) 1 B. C. C. 47 a.

(z) (1793), 4 B. C. C. 179; *ibid.* note; and see *Secretary of State for India v. Kamachee Boye Sahaba* (1859), 13 Moo. P. C. 22.

(a) (1813), 1 Dods. 320.

upon the King; and Lord Stowell, in holding that there had not been in that particular case a breach of the law, expressed the following opinion: "The utmost that I can venture to admit is that, if the King traded, as some Sovereigns do, he might fall within the operations of these statutes. Some Sovereigns have a monopoly of certain commodities, in which they traffick on the common principle that other traders traffick; and if the King of England so possessed and so exercised any monopoly, I am not prepared to say that he must not conform his traffick to the general rules by which all trade is regulated" (b). It was, however, held by the Court of Appeal in 1893 that this suggestion cannot be supported, and that an independent Sovereign does not waive his immunity even by residing in this country, and entering into a contract under an assumed name, even of so personal a character as a promise to marry (c). The question arose incidentally in *The Charkieh* (d), which was a cause of damage instituted by the owners of a Dutch vessel against a steamship belonging to the Khedive of Egypt, and carrying the flag of the Ottoman Navy, but at the time of the collision under charter to British subjects and advertised to carry cargo to Alexandria. It was held that the action was maintainable, both on the ground that the Khedive of Egypt was not an independent Sovereign, and on the ground that, even if he was, the privilege of sovereignty did not exclude an action for damage against the vessel itself, being a proceeding *in rem* (e). But it was also intimated by Sir R. Phillimore that, even assuming that the Khedive was entitled to the immunity of a Sovereign, he had, by entering into trade as a private individual, waived or forfeited that privilege. "If ever there was a case in which the alleged Sovereign, to use the language of Bynkershoek (f), was *strenue mercatorem agens*, or in which, as Lord Stowell says, he ought to traffic on the common principles that other traders traffic, it is the present case; and if ever a privileged person can waive his privilege by his conduct, the privilege has been waived in this case" (g). This language is no doubt inconsistent with what was afterwards (1893) decided by the Court of Appeal in *Mighell v.*

(b) (1813), 1 Dods. 320, 339. To the same effect is a *dictum* of Lord Campbell in *Wadsworth v. Queen of Spain* (1851), 17 Q. B. 171; and cf. *Munden v. Duke of Brunswick* (1847), 10 Q. B. 656, 662; and *Duke of Brunswick v. King of Hanover* (1844), 2 H. L. C. 1, 21-25.

(c) *Mighell v. Sultan of Johore*, [1894] 1 Q. B. 149; 63 L. J. Q. B. 593; *The Parlement Belge* (1879), 5 P. D. 197.

(d) (1873), L. R. 4 A. & E. 59.

(e) See, however, the adverse criticism of this opinion by the Court of Appeal in *The Parlement Belge* (1879), 5 P. D. 197, 215, 216.

(f) *Opera Omnia*, vol. ii. p. 165 (ed. 1767).

(g) (1873), L. R. 4 A. & E. 59, 99; Int. Law, ii. 181 (2nd ed.); Wheaton, Int. Law (1904), s. 101, p. 159.

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Sultan of Johore, and was expressly dissented from in that case. The same question arose in *The Parlement Belge* (h), in which Sir R. Phillimore held in the Court below that a Belgian vessel, carrying mails and carrying on commerce, did not come within the category of privileged vessels, though belonging to, and officered by, a foreign Sovereign, and protected by special treaty provisions. The Court of Appeal reversed this decision, holding, as a matter of fact, that the vessel in question had only been used subserviently and subordinately for trading purposes, but further intimating a strong opinion that when a ship was declared by a foreign Sovereign to be a public vessel of the State, or a ship of war, no inquiry by contentious testimony into the truth of that declaration could be allowed (i). The Court further laid down, as a general proposition, that as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign State to respect the independence of every other, "each and every one declines to exercise, by means of any of its Courts, any of its territorial jurisdiction over the person of any Sovereign or ambassador of any other State, or over the public property of any State which is destined to its public use, or over the property of any ambassador, though such property, ambassador, or Sovereign be within its territory, and therefore, but for the common agreement, subject to its jurisdiction" (k). So the Courts have refused to order the destruction of "shells" belonging to the Mikado of Japan, and alleged to be an infringement of the plaintiff's patent (l).

It is now further established that the question of independent sovereignty must be authoritatively determined (if in dispute) by a statement from a Secretary of State to the Crown; that such a statement is decisive; and that all independent Sovereigns, of the smallest or the greatest State, stand for this purpose on the same footing (m).

Lastly, the ordinary immunity from action which attaches to a foreign Sovereign may be waived by the acquisition of immovable property within the jurisdiction (n); so far, that is, as

Waiver by
Sovereign of
immunity.

(h) (1879), 4 P. D. 129; 5 P. D. 197.

(i) (1879), 5 P. D. at p. 219; *The Exchange*, 7 Cranch. 116 (Am.).

(k) (1879), 5 P. D. at p. 217.

(l) *Vavasseur v. Krupp* (1878), 9 Ch. D. 351. Cf. also *The Prins Frederik*, (1820), 2 Dod. 451; *The Athol* (1840), 1 W. Rob. 374; *De Haber v. The Queen of Portugal* (1851), 17 Q. B. 171; *Duke of Brunswick v. King of Hanover* (1844), 6 Beav. 1. The American cases in point are all cited and dealt with by Brett, L.J., in 5 P. D. at pp. 207 *seq.*

(m) *Mighell v. Sultan of Johore*, [1894] 1 Q. B. 149; 63 L. J. Q. B. 593; *The Gagara*, [1919] P. 95.

(n) Wheaton, Int. Law (1904), § 101 b; *The Charkieh* (1873), L. R. 4 A. & E. 97; *Taylor v. Best* (1854), 14 C. B. 487, 523; 23 L. J. C. P. 89.

actions relating to such immovable property are concerned. This is, no doubt, strictly upon the ground that no law, municipal or international, can be permitted to withdraw any part of the soil of a State from the control of its tribunals; and that foreigners, whether Sovereigns or subjects, are only allowed to acquire and hold British land subject to the condition of waiving any such privilege conferred by international law; but Sir R. Phillimore points out that it may also be supported on two grounds. These are, first, that the owner of such property has so incorporated himself into the jural system of the State in which he holds such property, that the argument of general inconvenience to States from allowing the exemption outweighs the argument from convenience on which the exemption in other matters is bottomed; and secondly, that such a suit can be carried on without the necessity of serving process upon the Sovereign, or of interfering in any way with such personal property as may be requisite for the due discharge of his functions (o).

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If the foreign Government does not appear and submit to the jurisdiction, there may, of course, be cases in which relief may be practically obtained against an agent employed by it, without the necessity of considering whether the action is, on principles of international law, maintainable against the Government itself. Thus, in *Larivière v. Morgan* (p), the French Government had contracted in England for the purchase of a large quantity of ammunition, which was to be paid for through the French ambassador when accepted; and the defendants, Morgan and others, who were English bankers, wrote to the contractor in England that a special credit for £40,000 had been opened in his favour, and would be paid to him on receipt of certificates from the French ambassador. Part of the ammunition having been delivered and paid for, further certificates and payments were refused, and the contractor thereupon filed his bill against the bankers and the French Government, praying to have the balance of £40,000 brought into Court, and for an inquiry and payment. The French Government did not appear; but the bankers were ordered to bring the money into Court, and the contractor was declared to be entitled to payment for all goods delivered under the contract. "I will put the case," said Lord Hatherley, "of a foreign Government having placed in this country a sum of money, and having charged it with certain trusts to be performed, subject to which the balance is to be paid back to the foreign Government. Is it possible to say that in such a case the trustee is not liable to perform the trust because

Liability of
agent of
foreign State.

(o) (1873), L. R. 4 A. & E. 97; per Sir R. Phillimore.

(p) (1872), L. R. 7 Ch. 550.

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Equities
arising out
of contract
by foreign
State.

the foreign Government, one of the *cestuis que trust*, cannot be made to appear?" (q). So in *Gladstone v. Musurus Bey* (r), where the plaintiffs had deposited certain securities in the Bank of England in the name of the Turkish ambassador, to secure the performance by them of a contract they had entered into with the Turkish Government, on the Turkish Government, through their ambassador, threatening to withdraw the securities deposited without having fulfilled their part of the contract, it was held that though it was not competent to the plaintiffs to obtain an injunction against the Turkish Government or ambassador, yet an injunction might be granted against the Bank to restrain them from parting with the securities or the funds representing them. In that event, if the Ottoman Government or its ambassador had attempted to compel the Bank to pay the proceeds to them, or to obtain damages against it for refusing to do so, they would, of course, have been compelled to avail themselves of the assistance of the English Courts, and therefore would have been regarded as submitting to the jurisdiction for all purposes. But where the contract which it is really attempted to take advantage of and enforce was actually made with the foreign Sovereign, a bill was held not to lie against a third person with whom the same foreign Sovereign had entered into an agreement in derogation of the advantages promised by his former contract with the plaintiffs, the bill praying an injunction and a declaration of the plaintiff's exclusive right (s); and it was said by Lord Hatherley that those who depend upon the grant of a foreign Sovereign cannot obtain the aid of the Court against the act of the foreign Sovereign in making a second grant inconsistent with the first. It is to be observed that in this case the Ottoman Bank, who were the nominal defendants, were in no sense the trustees or agents of the Ottoman Government, and the substantial ground of the decision seems to have been that the Court could not assert any jurisdiction to interfere with any acts of a foreign Sovereign done in the exercise of his sovereign power. The only equity alleged as affecting the defendants was that they had entered into their agreement with the Ottoman Government with full knowledge of the prior concession to the plaintiffs; but with neither of these contracts did the Court hold that it had any jurisdiction to deal, and it could not, therefore, deal with the equities arising out of them.

How far relief may be obtained against a foreign Sovereign by a proceeding *in rem* (excluding the case of immovable property,

Property
of foreign
States—
liability of.

(q) (1872), L. R. 7 Ch. 560; *Stevenson v. Anderson*, 2 V. & B. 407.

(r) (1862), 1 H. & M. 495.

(s) *Gladstone v. Ottoman Bank* (1863), 1 H. & M. 505.

which will be elsewhere considered) was not until lately quite free from doubt. In *The Charkieh* (t) Sir R. Phillimore expressed an opinion that, even if the Khedive was entitled to the privileges of a sovereign prince, it would not oust the jurisdiction of the Court to entertain a cause of damage against a vessel belonging to him; but that opinion was based on the ground that the *Charkieh*, though the property of the Khedive, was employed by him for the ordinary purposes of trade, as if the property of a private individual. It was not held, and never has been, that a ship of war belonging to the navy of a foreign Government is liable to any proceedings in an English Court (u). The opinion of Lord Stowell in *The Prins Frederik* (x) pointed to the opposite conclusion. In that case a Dutch ship of war had been saved from shipwreck by British subjects, who libelled her for salvage. On an objection to the jurisdiction being taken, it was contended that the salvors were not suing a foreign Sovereign *in personam*, but were proceeding *in rem* against a ship within the jurisdiction of the English Court. According to Lord Campbell (y), Lord Stowell was of opinion, in accordance with that which he had previously expressed in *The Comus* (z), that this distinction was untenable; but a representation having been made to the Dutch Government on the subject, the matter was settled by arbitration. Since the decision, however, of the Court of Appeal in *The Parlement Belge*, it is beyond doubt that no proceeding *in rem* against the public property of a foreign Sovereign or sovereign State will be allowed. Every State declines to exercise, by means of any of its Courts, any of its territorial jurisdiction over the person of any Sovereign or ambassador of any other State, or over the public property of any State which is destined to its public use, or over the property of any ambassador, though such Sovereign, ambassador, or property be within its territory (a). Nor does a foreign Sovereign waive his rights in respect of such property by applying to be made a defendant in an English suit for the purpose of obtaining his property (b). And if a foreign Sovereign does not choose to appear to an action brought against him here, movable property belonging to that Sovereign which happens to be locally situate in England cannot be attached to compel appearance (c). It was said in the cases

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(t) (1873), L. R. 4 A. & E. 59.

(u) (1873), L. R. 4 A. & E. 96.

(x) (1820), 2 Dods. 451, cited 17 Q. B. 212.

(y) *De Haber v. Queen of Portugal* (1851), 17 Q. B. 212.

(z) Cited 2 Dods. 464.

(a) Per Brett, L.J., in *The Parlement Belge* (1879), 5 P. D. 197, 217; *The Constitution* (1879), 4 P. D. 39; *The Porto Alexandre*, [1920] P. 30; *The Terwaete*, [1922] P. 259.(b) *Vavas seur v. Krupp* (1878), 9 Ch. D. 351.(c) *Wadsworth v. Queen of Spain* (1851), 20 L. J. Q. B. 488; 17 Q. B. 171; *De Haber v. Queen of Portugal* (1851), 20 L. J. Q. B. 495; 17 Q. B. 196.

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cited that, if such an attachment be issued, the garnishee is the proper person to move for a prohibition, but that such a prohibition may be granted on the motion of the Sovereign who has not appeared in the action, or even on that of a mere stranger. In the first case it was not expressly stated that the Queen of Spain was sued in her sovereign capacity, but it was held sufficient that that fact should appear from the disclosures in the affidavits; and it appears from the judgment in *Duke of Brunswick v. King of Hanover* (d) that the law in such a case will presume the foreign Sovereign to have acted in that character.

The rules which have been laid down above, as to the rights and liabilities of foreign Sovereigns and States in English Courts, are of course subject to the condition that the international independence and personality of the alleged Sovereign or State shall have been recognised by the Government of Great Britain in accordance with the law of nations; and English Courts are, it seems, bound to know or ascertain judicially whether such recognition has in fact been accorded (e). In *The Charkieh* this question arose with reference to the Khedive of Egypt, before Sir R. Phillimore, who stated in his judgment that he had endeavoured to inform himself, and had had recourse to obtain this knowledge to (1) the general history of the Government of Egypt, (2) the firmans which contain the public law of the Ottoman Empire on the subject, (3) the European treaties concerning the relations between Egypt and the Porte, and (4) the Foreign Office itself. On these materials Sir R. Phillimore held that the Khedive of Egypt was not an independant Sovereign, thus sanctioning by implication the view taken by counsel, that the sovereignty or quasi-sovereignty of a foreign Government or prince was not to be established by evidence offered by the parties in the cause, but by the judicial knowledge of the Court (f). The oldest case in which this principle was laid down appears to be that of *City of Berne v. Bank of England* (g), where it was adopted by Lord Eldon. In *Taylor v. Barclay* (h) it was falsely alleged by the plaintiff's bill that a revolted colony of Spain was "a sovereign and independent State, recognised and treated as such by His Majesty the King of these realms," the allegation being introduced to avoid a demurrer, by which a former bill founded on the same substantial facts had been

Sovereignty
and inde-
pendence of
foreign State
—recogni-
tion of,

judicially
ascertained
by the Court.

(d) (1844), 6 Beav. 1; ante, p. .

(e) *The Charkieh* (1873), L. R. 4 A. & E. 66; *City of Berne v. Bank of England* (1804), 9 Ves. 347; *Emperor of Austria v. Day* (1861), 2 Giff. 628; *Taylor v. Barclay* (1828), 2 Sim. 213.

(f) Taylor on Evidence, 10th ed. (1906), vol. i, pp. 3, 22; Wheaton, Int. Law (Lawrence), App. p. 970.

(g) (1804), Ves. 347.

(h) (1828), 2 Sim. 213.

met (i). It was held that the Court was bound to know that the allegation was false, and to act upon that knowledge; and a demurrer was therefore allowed. "Sound policy requires," said Shadwell, V.-C., "that the Courts of the King should act in unison with the Government of the King." The ground on which the demurrer was based being that a contract to lend money to a rebel so-called Government, whose independence had not been recognised by Great Britain, would be void for illegality, the Court was plainly bound to act on its own judicial knowledge to avoid a breach of international law, which might in some instances amount to a *casus belli*; and the decision in *Biré v. Thompson* (k), referred to by the Vice-Chancellor, was decided upon the same principle. Every Government is of course responsible, according to the law of nations, for the acts of its tribunals, and must be presumed to have given them the necessary information for their guidance. Where it has not also armed them with sufficient powers to carry out the principles of international law, it runs the risk of being compelled, in its sovereign character, to repair the omission. The deficiencies in English municipal law which led to the escape of the *Alabama* and her consorts during the American Civil War, and ultimately led to the Geneva Arbitration and the passing of the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90), will furnish a sufficiently modern illustration.

A foreign State, then, will be allowed to sue in an English Court, either in its impersonal form or represented by its Sovereign; and, under certain exceptional circumstances, may be made a defendant. When, however, it appears as litigant in an English Court, it cannot be allowed to escape from any of the obligations incidental to the suit, or to obtain any advantage over other suitors from its peculiar character. It must sue in a form (in the words of Sir J. Leach) which makes it possible for the Court to do justice to the defendants (l). The provisions of Order xxxi. r. 5 of the Judicature Acts (schedule), empowering the opposite party to apply at chambers for an order to administer interrogatories to any member or officer of a body corporate or a body of persons otherwise authorised by law to sue or be sued, in cases where such a body is party to the action, have been held to be applicable to foreign *States* as well as corporations (m). So the defendant in an action brought by such

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(i) *Thompson v. Powles* (1828), 2 Sim. 194. So a sovereign who claims the privilege of immunity as such must be reigning *de facto* at the time of the plea; *Munden v. Duke of Brunswick* (1847), 16 L. J. Q. B. 300.

(k) Cited in *Taylor v. Barclay* (1828), 2 Sim. 222. See also *Emperor of Austria v. Day* (1861), 2 Giff. 628.

(l) *Columbian Government v. Rothschild* (1826), 1 Sim. 94.

(m) *Republic of Costa Rica v. Erlanger* (1875), L. R. 1 Ch. D. 171.

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a body may apply to it to name some person from whom discovery may be obtained on its behalf, and, in default of compliance, proceedings may be stayed (*n*). It was formerly necessary to make the person named defendant in a cross suit for discovery, but now interrogatories may be administered without taking that course, under the Rule of Court already referred to. And in an old case it was held that a foreign Sovereign, when suing in this country, might be compelled to give security for costs like any other plaintiff bringing a similar action (*o*).

The principle that Sovereigns and sovereign States are not liable to actions in municipal Courts, whether domestic or foreign, for acts done in their sovereign capacity, has been extended further. Acts of sovereignty do not create any civil right or liability whatever, either in the nature of contract (*p*) or of tort (*q*). Thus, acts done by agents of sovereign Governments, either with express authority, or with the authority implied by subsequent ratification and adoption, give rise to no contractual relation between the agents of the Government on the one hand, and the other person or personality affected by the act on the other (*r*). A petition of right would seem to be the only remedy available for a wrong sustained by such person affected (*s*). The law is the same when an act is done by an agent of an independent Government, either clothed with authority or supported by subsequent ratification, that would have been tortious if done by a private individual. "If," says Parke, B., in the case cited, "an individual ratifies an act done on his behalf, the nature of the act remains unchanged. It is still a mere trespass, and the party injured has his option to sue either. If the Crown ratifies an act, the character of the act becomes altered; for the ratification does not give the party injured the double opportunity of bringing his action against the agent who committed the trespass or the principal who ratified it, but a remedy against the Crown only (such as it is), and actually exempts from all liability the person who commits the trespass. Whether the remedy against

(*n*) *United States of America v. Wagner* (1867), L. R. 2 Ch. 582, 589; *Republic of Peru v. Weguelin* (1875), L. R. 20 Eq. 140. See, on the old practice, *King of Spain v. Hullett* (1828), 7 Bligh (N.S.), 259, and cases there cited.

(*o*) *Emperor of Brazil v. Robinson* (1838), 5 Dowl. P. C. 522; *King of Greece v. Wright*, 6 Dowl. P. C. 12.

(*p*) *Doss v. Secretary of State for India* (1875), L. R. 19 Eq. 509; *Secretary of State for India v. Kamachee Boye Sahaba* (1859), 13 Moo. P. C. 22; *Sirdar Bhagwan Singh v. Secretary of State for India*, L. R. 2 I. App. 38; *Nabob of the Carnatic v. East India Co.* 1 Ves. 371; *Duke of Brunswick v. King of Hanover* (1844), 6 Beav. 1; *Elphinstone v. Bedreechund* (1830), 1 Knapp, 316.

(*q*) *Buron v. Denman* (1848), 2 Ex. 167.

(*r*) *Secretary of State for India v. Kamachee Boye Sahaba* (1859), 7 Moo. Ind. App. 476; S. C. 13 Moo. P. C. 22.

(*s*) *Thomas v. The Queen* (1874), L. R. 10 Q. B. 31.

the Crown is to be pursued by petition of right, or whether the injury is an act of State without remedy, except by appeal to the justice of the State which inflicts it, or by application of the individual suffering to the Government of his country, to insist upon compensation from the Government of the other—in either view the wrong is no longer actionable” (t). There must, however, be either previous authority or subsequent ratification; and an agent or servant of a sovereign State will therefore be held liable for acts done by him in excess of his authority, if no subsequent ratification by his Government is shown (u). The principle itself is clearly a necessary result of the ordinary intercourse of nations. If it were not recognised, the absurdity would follow that every member of the military and naval forces of his country would be liable to a civil action of trespass for the execution of his duty on active service. A trespass authorised by a sovereign State is, in truth, an act of war, and can only be dealt with as such.

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(iii.) FOREIGN AMBASSADORS.

The general principle has been shown to be that an independent Sovereign is not liable to be sued in the Courts of a foreign State, unless he has in some manner waived his sovereignty and the immunity which it confers, or otherwise consented to the jurisdiction, or bears the double character of Sovereign and subject, and is sued in the latter character only. The rule and its exceptions apply with equal force whether the person of the foreign Sovereign is or is not within the jurisdiction; though in the latter case the additional privilege of immunity from personal arrest and detention is invariably conferred on the Sovereign by public international law (x). But with the ordinary and *prima facie* immunity from action which a foreign Sovereign enjoys is often confounded another privilege—viz. the immunity of an ambassador or other authorised representative of an independent State.

Diplomatic
immunity

The principle upon which this immunity rests is, what is commonly called the fiction of extra-territoriality (*ex-territorialité*). The residence of a foreign Minister within the jurisdiction of the State to which he is accredited is, by this fiction, to which the Sovereign of the State assents by receiving him, considered as a continuing residence in his own country; and this fictitious situation is applied not only to the person of the Minister, but to his family and suite, secretaries of legation and

rests on
theory of
extra-terri-
toriality.(t) Per Parke, B., in *Buron v. Denman* (1848), 2 Ex. 167, 188.(u) *Madrazo v. Wiles* (1820), 3 B. & Ald. 353; *The Rolla* (1807), 6 Rob. 364.

(x) Wheaton, Int. Law (1904), p. 153.

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other secretaries, servants, movable effects, and the house in which he resides (y). Thus, the children of English ambassadors born abroad have the full rights of British nationality, including the power of transmitting it to their descendants (z). The person of the Minister is, moreover, entirely exempt from all civil jurisdiction.

Both at common law and under the Diplomatic Privileges Act, 1708, said Astbury, J., in *In re Republic of Bolivia Exploration Syndicate, Ltd.*, [1914] 1 Ch. 139, all writs against foreign public ministers accredited to the Court of this country are absolutely null and void (a). And this privilege attaches not only to the minister himself but to all other members of the embassy or legation who have been received on this footing.

But it is doubtful how far by English law they are exempt from criminal proceedings. The English law, says Pitt Cobbett, does not appear to recognise any exemption save on the part of the Ambassador himself and persons who are actually members of the Embassy. He cites a case in 1827, where an assault was committed outside the Embassy by a coachman in the service of the United States Ambassador, the offender being arrested in the stable of the Embassy. In the discussion which followed, the British Foreign Office appears to have denied that an ambassador's servants were exempt from arrest, and to have asserted a right of arrest even within the precincts of the Embassy (b). The learned authors of 9 *Halsbury's Laws of England*, p. 245, go further and declare that "The exemption of ambassadors of foreign States, their servants and retinue, from the criminal jurisdiction of the country to which they are accredited, though asserted by writers on international law, is not

(y) Wheaton, *Int. Law* (1904), §§ 98, 224, 235. It is said by Brett, L.J., in *The Parlement Belge* (1879), 5 P. D. 207, that the immunity of an ambassador from the jurisdiction of the Courts of the country to which he is accredited is based upon his being the representative of the independent sovereign State which sends him, and which sends him upon the faith of his being admitted to be clothed with the same independence of, and superiority to, all adverse jurisdiction as the sovereign authority whom he represents would be. No doubt this is the reason that the principle of extra-territoriality was introduced; but the principle itself has been too long established to be left out of sight. In accordance with this theory, the children born abroad of English ambassadors abroad are regarded as natural-born subjects: *Calvin's Case* (1608), 7 Rep. 13 a, from which it appears that the mother must be an Englishwoman. But see, *contra*, *Bacon's Case* (1641), Cro. Car. 601; *Doe v. Jones* (1791), 4 T. R. 300.

(z) *De Geer v. Stone* (1882), 22 Ch. D. 243.

(a) See also *Barbuit's Case* (1737), Cas. t. Tal. 281; *Triquet v. Bath* (1764), 3 Burr. 1478; *Hopkins v. De Robeck* (1789), 3 T. R. 79; *Fisher v. Begres* (1833), 2 Cr. & M. 240; *Taylor v. Best* (1854), 14 C. B. 487; *Magdalena Steam Navigation Co. v. Martin* (1859), 2 E. & E. 94; *Gladstone v. Musurus Bey* (1862), 1 H. & M. 495; *Macartney v. Gerbutt* (1890), 24 Q. B. D. 368; *Mighell v. Sultan of Johore*, [1894] 1 Q. B. 149; *Musurus Bey v. Gadban*, [1894] 1 Q. B. 533; *The Jassy*, [1906] P. 270.

(b) *Leading Cases* i., 311 (4th ed.), by Bellot. See Wharton, *Dig. i.*, 150

sanctioned by the English Courts or by any authority on English criminal law." In 1653, Don Pantaleon Sa, brother of the Portuguese Ambassador, and one of his embassy, was indicted for murder, tried, convicted and executed, notwithstanding the plea of privilege raised by him, and claimed by the ambassador (c). Hale lays it down that an actual attempt of treason against the person or government of the Sovereign "which attains as great a consummation as the ambassador is able to effect," is prohibited both by municipal and international law, and the ambassador may be proceeded against as an enemy, although not as a traitor. And if he or his associates commit any other capital offence, as rape, murder, theft, they may be indicted and proceeded against in the ordinary course of justice, as other aliens committing like offences. Hale cites Pantaleon Sa's Case in support. But as he says, that is for the King to decide as a matter of policy whether he shall be tried or sent back to his own sovereign (d). Hawkins is to the same effect. An ambassador, he says, committing treason against the King's life may be condemned and executed here, and for other treasons he shall be sent home (e). This is what happened to the Swedish minister at London, Count Gyllenborg, who had been arrested in 1717 for taking part in a Jacobite conspiracy. "A foreign minister," said Mahon "who conspires against the very government with which he is accredited has clearly violated the law of nations. He is, therefore, no longer entitled to protection from the law of nations. The privileges bestowed upon him by the law rest on the implied condition that he shall not oust the bounds of his diplomatic duties, and whenever he does so, it seems impossible to deny that the injured government is justified in acting as its own preservation may require." And where the Sardinian minister was alleged to have been privy to the Tuscan revolution in 1859, Lord Stratford de Redcliffe doubted whether, if this were really the case, his diplomatic character would have screened him from punishment (f). In *Magdalena Steam Navigation Co. v. Martin, Wightman, J.*, questioned the doctrine that an ambassador was entirely exempt from the local jurisdiction in criminal as well as in civil cases. The present editor, therefore, differs from the proposition of the late learned author that the person of a foreign Minister is entirely exempt from all criminal jurisdiction.

To the rule that a foreign Minister, his family and suite are in
 Extent of immunity.

(c) 81 Tr. 461.

(d) Pl. C. i., 96.

(e) Pl. C. i., 51.

(f) *Hansard's Parl. Deb.* (3rd series), vol. cliv, p. 1289. For other instances of expulsion see Coleman Phillipson's "Wheaton," p. 343.

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general exempt from civil and criminal jurisdiction, Wheaton states the three following exceptions. First, the exemption does not apply to the contentious jurisdiction, so far as the person claiming the diplomatic immunity voluntarily makes himself party to an action. Secondly, he continues subject to the jurisdiction, if he is a citizen or subject of the country to which he is sent, and that country has not renounced its rights over him. Thirdly, he is subject to the jurisdiction, if he is not only entitled to the diplomatic immunity in one character, but is in another in the service of the Power to which he is accredited (a).

The extent of the diplomatic immunity which attaches, as has been said, to the whole of the Minister's family and suite is not very easily defined. It includes, however, exemption from all writs and process of the Courts, and judicial restraints upon his person, his movements, and his time. Thus an attaché of a foreign embassy is exempt from all parochial or other local rates, which cannot be exacted either by ordinary process or by seizure of his furniture (b), even though he himself be a British subject (c). But a chorister in the service of the Portuguese ambassador, who was carrying on the business of a lodging-house keeper, has been held not to be privileged against distress for poor-rate (d). Thus it appears, not only that he cannot be brought into Court as a defendant, but that the same objection applies to his coming there as a witness; and it is clearly laid down that he cannot be compelled to appear and give evidence, even in criminal cases. Thus, in the trial of Herbert for murder at Washington, in 1856, the Minister of the Netherlands, who was an important witness to the transaction, refused to appear in Court at the request of the United States Government, who admitted his right to decline, and his own Government refused to instruct him to appear as a witness, although requested to do so by the United States. The principle of his objection appears to have been, that though his testimony might have been voluntary in the first instance, yet circumstances might have subjected him to compulsion with respect to rules of cross-examination and procedure which justice to the parties implicated might require the Court to enforce. It is clear that a person entitled to the diplomatic immunity may waive the privilege by appearing in Court to give testimony, by commencing an action as plaintiff, or by voluntarily appearing to a writ and pleading otherwise than to the jurisdiction. Thus, in a case arising out of the Sicilian

Waiver of
immunity—
as witnesses.

(a) *Int. Law* (2nd ed.), 394.

(b) *Parkinson v. Potter* (1885), 16 Q. B. D. 152.

(c) *Macartney v. Garbutt* (1890), 25 Q. B. D. 368. See, however, per Wills, J., in *Parkinson v. Potter* (1885), 16 Q. B. D., at p. 162.

(d) *Novello v. Toogood* (1823), 1 B. & C. 554.

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insurrection in 1848, which was tried at the Old Bailey in July, 1849, the Neapolitan Minister voluntarily appeared and gave evidence against the prisoners, who were charged with unlawfully fitting out ships of war against a friendly Sovereign, under the Foreign Enlistment Act (*e*). So in *Taylor v. Best* (*f*), one of four co-defendants, being secretary of legation to the King of the Belgians, appeared voluntarily and pleaded to the merits. After notice of trial he obtained a rule *nisi* to stay further proceedings, or strike his name out of the action, which was discharged, upon the ground that though he was entitled to claim diplomatic immunity, he had in fact waived his privilege by appearing, and pleading, and could not afterwards rely upon what he had abandoned. The Court further laid stress upon the fact that it did not appear that the result of the action would be to interfere in any way with the person or effects of the defendant, but it is difficult to see how this could have been assumed, or how, if true, it could in any way alter the effect of the alleged waiver of the diplomatic immunity.

If an ambassador entitled to the diplomatic immunity waive his privilege by bringing an action, it does not appear quite clear how far he is placed in the position of an ordinary litigant. In 1816 the Court of Queen's Bench refused to make such a plaintiff give security for costs (*g*), on the ground that there was no precedent for such a course, with the exception of a case in 1727, where a similar order had been made on an ambassador's servant (*h*). The diplomatic immunity, however, extends equally to an ambassador and all the members of his suite (*i*) (with the exception to be mentioned immediately), so that there appears to be little reason for the distinction; and since the date of the decision referred to, foreign Sovereigns themselves, when suing in English Courts (*k*), have been more than once compelled to give security for their costs. The case cited would therefore probably not now be followed.

The diplomatic immunity has hitherto been treated of by the

(*e*) It appears from the *Annual Register*, 1849, p. 70, where an account is given of this trial, that the indictment was preferred at the instance of the Neapolitan Minister himself. The author is indebted to Sir E. Hertslet, of the Foreign Office, for calling his attention to this instance of the diplomatic privilege being waived.

(*f*) (1854), 14 C. B. 487; 23 L. J. C. P. 89. Cf. *Gladstone v. Musurus Bey* (1862), 1 H. & M. 495, at p. 495.

(*g*) *Duke of Montellano v. Christin*, 5 M. & S. 503; *Davies v. Solomon*, cited Tidd, Pr. 535, n. (s).

(*h*) *Goodwin v. Archer* (1727), 2 P. W. 452.

(*i*) Wheaton, Int. Law (1904), § 225, p. 333.

(*k*) *Emperor of Brazil v. Robinson* (1838), 5 Dowl. P. C. 522; *King of Greece v. Wright*, 6 Dowl. P. C. 12. In *Gladstone v. Musurus Bey* (1862), 1 H. & M. 495, 504, the language of Wood, V.-C., indicates that, if an ambassador became a plaintiff, the Court would administer justice between all the parties in the ordinary way.

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Effect of
statute
7 Anne, c. 12.

light of the principles of public international law which have been laid down by jurists and acknowledged in British Courts. They were, however, but little understood or practised until the circumstances which led to the passing of the 7 Anne, c. 12, which does in fact do little more than declare the common law on this subject (l). This statute was passed in consequence of the arrest of the Russian ambassador in the streets of London for a debt of trivial amount, and the diplomatic difficulties which arose out of the supposed insult to the representative of the Czar (m). It enacts that all writs and processes thereafter sued forth against the person of any ambassador or other public Minister of a foreign State, or of any domestic servant of such ambassador or Minister, or for the distraint, seizure, or attachment of their goods or chattels, shall be null and void (s. 1); but that no merchant or other trader whatever, within the description of any of the statutes against bankrupts, who hath put or shall put himself into the service of any such ambassador or public Minister, shall have or take any manner of benefit from the Act (s. 3). It will therefore be noticed that the servant of an ambassador may by trading waive the diplomatic immunity to which he is entitled; a liability which does not, as will be shown below, attach to ambassadors or Ministers themselves. As a matter of practice, indeed, the affidavits made by ambassadors' servants claiming the protection of the Act have generally negatived expressly the fact of the applicant being engaged in trade (n).

In *Suarez v. Suarez*; *In re Suarez*, [1918] 1 Ch. 176, where both parties were desirous of having the estate administered by the Court, the defendant Pedro Suarez, minister for the Republic of Bolivia in England, accepted service, and at the hearing of the originating summons and by his counsel waived his privilege, and the order for administration was made. An order having been made for the payment into Court of a large sum by the defendant, a summons for leave to proceed to execution and for liberty to issue a writ of sequestration was issued by the plaintiff. At the hearing the defendant asserted his immunity from process by way of execution, and set up the statute of 1708. Thereupon, Eve, J., declined to make any order on the summons, except that it should stand over generally with liberty to restore in the event of the defendant ceasing to hold an office to which the immunity attached. Subsequently

(l) *Novello v. Toogood* (1823), 1 B. & C. 564; *Hopkins v. Robeck* (1789), 3 T. R. 79; *Magdalena Steam Navigation Co. v. Martin* (1859), 2 E. & E. 94; 28 L. J. Q. B. 310.

(m) See the account of these circumstances in Steph. Bl. ii. 488. The statute is set out in an Appendix to this chapter.

(n) *Malachi Carolino's Case* (1743), 1 Wils. 78; *Hopkins v. De Robeck* (1789), 3 T. R. 79; *Viveash v. Becker* (1814), 3 M. & S. 284.

the plaintiff's solicitors were informed by the Secretary of State that the Bolivian Government had terminated the defendant's appointment. The summons was thereupon restored, and Eve, J., in granting the plaintiff's application, said that although the diplomatic privilege did not cease for a reasonable time after the diplomatic mission was determined, this was not a case in which further time ought to be granted. The defendant had departed secretly after an order for payment of money had been made, and he was a fugitive from justice. He deliberately remained out of the jurisdiction, and had done nothing to meet the order. There was not a shred of evidence to show that the granting of the order would interfere with the defendant's service to his country.

In affirming this judgment, Swinfen Eady and Warrington, L.JJ., following the decision in *Taylor v. Best*, held that a Minister may, with the consent of his Sovereign, waive his privilege notwithstanding the provisions of the Statute of Anne. Section 3 of that Statute, said Swinfen Eady, was declaratory of the common law, and must therefore be construed according to the common law, of which the law of nations must be deemed a part. "Independently of the Statute," said Warrington, L.J., "the privilege of being free from process in this country, whether it be that of a Sovereign of another State or of an ambassador of such a Sovereign, was capable of being waived." Proceedings could validly be prosecuted if the privileged defendant submitted to the jurisdiction. The Statute of Anne is merely declaratory. It should be construed so as to maintain the privilege as it existed when it was passed, and to render void only those writs and processes which are "sued forth or prosecuted" against the will of the privileged person. The Court, therefore, had jurisdiction to make all the orders made up and including those in which the order for the writ of sequestration was provided. The last order was made when the privilege no longer existed, and was therefore properly made. In arguing with the decision of the Court, Scrutton, L.J., proposed to rest his judgment on the ground that the defendant was estopped from contesting the validity of the proceedings in the action by his own conduct. He was not satisfied that *Taylor v. Best* could be treated, in a case where it had to be considered, as a satisfactory authority for anything.

After the recognition of the Soviet Government of Russia by the British Government as the *de facto* Government, in the Trade Agreement of 16 March, 1921, it appeared that Krassin had been recognised and received only as the official agent of the Soviet Government appointed under and for the purposes of

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that Agreement, which provided that official agents thereunder should be immune from arrest and search, but did not provide for immunity from civil process. On these facts, it was held by the Court of Appeal, in *Fenton Textile Association, Ltd. v. Krassin*, 38 T. L. R. 259 (1921), that Krassin had not been received or recognised by a competent authority in any other capacity than that of an official agent under the Agreement. His position, therefore, was to be determined, not by any general law of nations or common law, but by the special agreement between the two countries. His status was insufficient to carry with it the immunity accorded to accredited ministers of foreign States.

As already stated, the statute of 1708 was declaratory of the common law. The preamble recites that the arrest had been made "in contempt of the protection granted by her Majesty, contrary to the law of nations, and in prejudice of the rights and privileges which ambassadors and other public Ministers have at all times been thereby possessed of, and ought to be kept sacred and inviolable." The persons who shall violate the provisions of the statute itself are to be deemed "violators of the law of nations, and disturbers of the public repose." "The Act itself," said Lord Tenterden, "was only declaratory and in confirmation of the Common Law. It must, therefore, be construed according to the Common Law, of which the law of nations must be deemed a part" (o). The same view is taken of the scope and effect of the statute by Lord Campbell, C.J., in *Magdalena Steam Navigation Co. v. Martin* (p). So far as regards the immunity of those persons who are the subjects of this legislation, the authorities on international law cited above show that this view is a correct one; but there is considerably more doubt about the 3rd section, which prevents "traders" from taking or deriving any benefit from the Act as servants of an embassy. The rule of international law appears to be, as will be shown below, that the diplomatic immunity of an ambassador cannot be waived by his entering into trade, although it has been already seen that an independent Sovereign can waive his immunity by a similar course. The reason of the distinction may be that the privilege of an ambassador is not his own, but something entrusted to him for the mutual benefit of the country which he represents and that to which he is accredited; and therefore that it cannot be waived by his entering into commercial relations with those amongst whom he dwells—a practice which,

Distinction
between
ambassadors
and ambas-
sadors'
servants.

(o) *Novello v. Toogood* (1823), 1 B. & C. 554.

(p) (1859), 28 L. J. Q. B. 310; 2 E. & E. 94. See also *Hopkins v. De Robeck* (1789), 3 T. R. 79.

when adopted by members of a diplomatic body, is always viewed with disfavour (g). Whatever the reason of the rule, it would almost certainly have applied, on the principles of international law alone, to the servants of ambassadors and the ambassadors themselves equally; and the statute therefore does make a distinction between ambassadors and their servants which the common law itself would never have drawn.

The statute, however, now defines the extent and manner of the recognition to be given to the rules of public international law on this particular subject, and must be taken in substitution for them. "It must be considered," says Lord Ellenborough, "as declaratory not only of what the law of nations is, but of the extent to which that law is to be carried" (r). It has been repeatedly held that, in order to take advantage of it, the claimant must be actually and *bona fide* in the service of the foreign Minister, and that no colourable or collusive employment will do (s). The fact of the service, and its nature, must, it seems, be established by affidavit (t); and where a physician, during the pendency of a writ of error on a judgment which had been recovered against him, obtained a retainer to serve the Bavarian Minister at a salary of £40 a year, and swore that he had not since accepting it prescribed for or advised any other patients, he was held not to be entitled to the protection he claimed (u). The law is, in short, that the process of the law shall not take a *bona fide* servant of a foreign Minister out of his service, but that nevertheless a foreign Minister shall not take a person who is not his *bona fide* servant out of the custody of the law, or in any way screen him from the payment of his just debts (x). Such *bona fide* servants need not be in the habit of sleeping in the house of the Minister, provided that they are in his actual service (y); and it seems that a chorister, *bona fide* employed by an ambassador in the performance of religious worship in his chapel, is a servant for the purposes of this Act (z).

In *Assurantie Compagnie Excelsior v. Smith*, 40 T. L. R.

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Service of
ambassadors
contemplated
by statute
must be
actual and
bona fide.

(g) Wheaton, Int. Law (1904), § 225 c. p. 335.

(r) *Viveash v. Becker* (1789), 3 M. & S. 298.

(s) *Cross v. Talbot* (1724), 8 Mod. 288; *Evans v. Higgs* (1727), 2 Str. 797; *Seacomb v. Boulney* (1743), 1 Wils. 20; *Darling v. Atkins* (1769), 3 Wils. 33; *Delvalle v. Plumer* (1811), 3 Camp. 47.

(t) *Malachi Carolino's Case* (1743), 1 Wils. 78.

(u) *Lockwood v. Coysgarne* (1765), 3 Burr. 1676.

(x) *Heathfield v. Chilton* (1767), 4 Burr. 2016.

(y) *Wedmore v. Alvarez* (1730), 2 Str. 797; *Evans v. Higgs*, *ibid.*; *Darling v. Atkins* (1769), 3 Wils. 33; *Novello v. Toogood* (1823), 1 B. & C. 562.

(z) *Fisher v. Begrez* (1832), 1 C. & M. 117. It has been recently held, by the tribunals of Prussia, that a coachman hired with a carriage from a livery stable keeper, by the French ambassador, was not the servant of the ambassador, and not exempt from process. See *Law Magazine and Review*, August, 1889, and *Journal du Droit Int. Privé*, 1889, pt. i. ii.

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*Foreign
Ambassadors.*Service to be
shown on
affidavit.

105 (1923), the defendant claimed diplomatic privilege on the ground that he was an American citizen domiciled in the United States, and chief of the Mail Department of the American Embassy in London, and on the personal staff of the Ambassador. It was held that by the rules of international comity, a person in the position of the defendant was immune from civil proceedings.

It is not enough to state that the name of the person who claims immunity as an ambassador's servant was registered at the office of the Secretary of State, and thence transmitted to the sheriff's office, since an actual service must be disclosed upon the affidavits, though (a) it is not, of course, necessary that every particular act or habit of service should be specified; and if service is *prima facie* shown, the presumption will be, in the absence of further evidence, that it is not colourable or collusive (b). But unless the name of the claimant has been so registered in the office of the Secretary of State, and transmitted to the sheriff's office, it appears that the sheriff or sheriff's officer making the arrest is not liable to the summary proceedings provided by way of punishment in s. 4 of the Act (c); nor will the mere fact that the defendant has been appointed chaplain to a foreign ambassador or Minister entitle him to protection, unless it is shown that he does duty as such chaplain (d). In a case where the wife of the defendant was arrested under a writ issued against both, the defendant swore that before and at the time the writ was issued he was in the actual employment of the ambassador to the King of Spain, as second secretary to the embassy; that his employment consisted in writing despatches and other official documents for the ambassador, and that he was in daily attendance upon him (e). The Court refused to quash the writ, Abbott, C.J., on the ground that the affidavit did not state that the defendant was a domestic servant of the ambassador, or employed in the ambassador's house; Holroyd, J., also on the ground that the writ was not absolutely void because it had issued, unless or until put in force by an arrest. It is difficult, however, to see that the affidavit was defective in any material particular, and the other reason on which the judgment of Holroyd, J., proceeded is directly contrary to the express words of the statute, which provide that all writs thereafter sued forth or prosecuted, whereby . . . the

(a) *Fisher v. Begrez* (1832), 1 C. & M. 117.

(b) *Triquet v. Bath* (1764), 3 Burr. 1478.

(c) *Seacomb v. Bowlney* (1743), 1 Wils. 20.

(d) *Seacomb v. Bowlney* (1743), 1 Wils. 20. A person in the navy cannot, it seems, be a domestic servant to an ambassador: *Darling v. Atkins* (1769), 3 Wils. 33.

(e) *English v. Caballero* (1823), 3 Dowl. & R. 25. In *Carolino's Case* (1743), 1 Wils. 78, it was held that an interpreter was not a domestic servant.

domestic servant of any ambassador or public Minister may be arrested or imprisoned, or his goods and chattels may be seized, distrained, or attached, shall be deemed and adjudged to be utterly null and void to all intents, constructions, and purposes whatsoever (*f*). The case is said to have been one of considerable suspicion, and must probably be regarded as an instance of the law being strained to fulfil the presumed requirements of expediency and moral justice.

The privilege of immunity is expressly conferred upon the goods as well as the person of all who are entitled to it, but this exemption does not attach to all such goods without qualification. Where the claimant of the privilege, as chorister to a foreign ambassador, resided in a separate house, part of which he let out as lodgings, was a teacher of music and languages, and also acted as prompter at one of the London theatres, it was held that his goods in that house, not being necessary for the convenience of the ambassador, or for the due performance of the claimant's service, were liable to be distrained for poor-rate (*g*). In this case the Court seems to have considered that the goods seized were possessed by the claimant, not in his capacity of ambassador's servant, but in some other character. The question how far the protection of the statute attached to goods of an ambassador's servant *dehors* the house of the ambassador was also raised in *Fisher v. Begrez* (*h*), but it was unnecessary to decide it, the Court coming to the conclusion that the affidavits did not sufficiently show that the claimant was a domestic servant to the ambassador at all; and that the fact that his name was included in the list which had been registered in the office of the Secretary of State, and transmitted to the sheriff's office, was insufficient. The object of that list, it was said, was to call the attention of the sheriff to the names registered and to protect him, in case the party against whom he should execute process should claim the diplomatic immunity without having been registered (*i*).

The statutory immunity conferred by this Act does not attach to consuls (*k*), and must in strictness be confined to those whom it mentions—namely, ambassadors or public Ministers and their domestic servants. It has already been said that in general writers on public international law consider that it properly belongs to the wife and family, servants and suite of the

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Extent of
statutory
immunity.

Statutory
immunity
not extended
to consuls.

(*f*) 7 Anne, c. 12, s. 3.

(*g*) *Novello v. Toogood* (1823), 1 B. & C. 554.

(*h*) (1832), 1 C. & M. 117.

(*i*) *Fisher v. Begrez* (1832), 1 C. & M. 127; *Hopkins v. De Robeck* (1789), 3 T. R. 79, 80; *Delvalle v. Plumer* (1811), 3 Camp. 48.

(*k*) *Viveash v. Becker* (1789), 3 M. & S. 284; *Clarke v. Cretico* (1808), 1 Taunt. 105. See note on Consuls at end of this chapter.

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Minister, as well as to all persons attached to the legation or embassy; but it must be very doubtful how far any protection beyond that conferred by the statute can be claimed in an English Court. "I cannot help thinking," said Lord Ellenborough, "that the Act of Parliament, which mentions only ambassadors and public Ministers, and which was passed at a time when it was an object studiously to comprehend all kinds of public Ministers entitled to these privileges, must be considered as declaratory, not only of what the law of nations is, but of the extent to which that law is to be carried." These considerations, however, can only apply to the issue and service of the writs to which the statute is confined, and to such persons as the Legislature may fairly be taken to have contemplated, and not to extraordinary representatives of a foreign Government, whose office has been called into existence by a special occasion. Thus, in *Service v. Castaneda* (l) it was held that an injunction could not be sustained against the agent of a foreign Government, whose business in this country was only that of settling certain claims upon the Government he represented, and whose acts in that capacity were done entirely under the control of the ambassador of that Government resident in England. "If the statute of Anne," said the Vice-Chancellor, "does not apply to this particular case, the Common Law does."

Common Law
immunity
from suit—
not affected
by statute.

It will be observed that the Act refers only to the issue and service of writs whereby the person or goods of ambassadors or their servants may be seized or attached. It was not intended by it to abridge the immunity given to ambassadors by the law of nations, that they shall not be impleaded in the Courts of the country to which they are accredited (m). Not only is this a principle of international law, but it was expressly laid down by Lord Campbell in 1859, that a public Minister duly accredited to the British Crown by a foreign State is privileged from all liability to be sued here, quite apart from the operation of the statute of Anne (n); and this principle may of course be extended, theoretically speaking, to the ambassador's family and suite, and members of the legation, though there is no English authority practically carrying the doctrine further than the case just cited. In *Taylor v. Best* (o), indeed, the Court had hesitated

(l) (1845), 2 Coll. 56.

(m) Per Lord Campbell, *Magdalena Steam Navigation Co. v. Martin* (1859), 28 L. J. Q. B. 310, 315.

(n) *Magdalena Steam Navigation Co. v. Martin* (1859), 28 L. J. Q. B. 310.

(o) (1854), 23 L. J. C. P. 89. See *Macartney v. Garbutt* (1890), 24 Q. B. D. 368, where it appears to have been assumed that the defendant, who was a member (as secretary) of the Chinese Embassy, was an ambassador or public Minister within the statute of Anne. There can be little doubt that the statute 35 Geo. 3, c. lxxiii., referred to in that judgment, intended to deal with persons affected by the statute of Anne, and such persons only.

to carry it so far, and while holding that the defendant had waived his privilege, if any existed, by appearance and plea, left it doubtful whether an ambassador could be sued at all by process not affecting his person or his goods, when there had been no such waiver. In the more recent case of *In re Cloete* (p), the privilege claimed was refused to an alleged honorary attaché of the Persian Embassy, on the grounds (1) that he was not a *bona fide* member of the embassy, (2) that he had not been recognised as such by the British Government or Foreign Office, (3) that the appointment was improperly obtained to defeat creditors, and (4) that he had waived the privilege (if any) by consenting to judgment.

The case of *Taylor v. Best* is an authority for the proposition that an ambassador does not lose his privilege by trading in the country to which he is accredited, which has been already stated. "The privilege," said Jervis, C.J., "is not, in the case of a Minister, interfered with or abandoned by the circumstance of trading, as it would be if the claim were set up in respect of the privileges of a servant of the ambassador under the statute of Anne. If an ambassador or Minister violate the character in which he is delegated to this country, by entering into commercial transactions, that raises a question between the country to which he is sent and the country from which he is sent; but he does not thereby lose any privilege to which he may be entitled; the privilege being a general privilege, and the limitation attached to the privilege, by reason of trading, being confined by the statute of Anne to the case of servants of the ambassador, who may lose the privilege" (q). It was, however, held that the defendant in this case had lost his privilege by not taking the objection at an earlier stage of the action, and a rule to strike his name out of the record was consequently discharged.

Inasmuch as while the immunity of an ambassador or Minister exists, it is not competent for any person to sue out a writ against him, or to renew a writ if issued, it has lately been held that the Statute of Limitations does not begin to run against his creditors during the period of such immunity (r). And it appears by the same case that the immunity continues not only whilst the ambassador is actually accredited, but for a reasonable time after he has been recalled, or has otherwise ceased to hold office. In the event of his death, it is usual to continue the same privileges and immunities to his widow, family, and suite for such reason-

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Ambassadors.Ambassadors'
privilege not
waived by
trading.(p) *In re Cloete* (1891), 65 L. T. Rep. (N.S.) 102.(q) *Taylor v. Best* (1854), 23 L. J. C. P. 89, 93; 14 C. B. 487; *Barbuit's Case* (1737), Cas. temp. Talbot, 281.(r) *Musurus Bey v. Gadban* (1894), 2 Q. B. 353. Cf. *Magdalena Steam Navigation Co. v. Martin* (1859), 2 E. & E. 94.

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able period as may be sufficient to enable them to leave the country (s).

Whether or not the immunity or privilege attaches, when the servants of the ambassador are subjects of the State against whose laws they assert it, must still be regarded as doubtful, as a general principle. In England the question is not of much importance, inasmuch as the statute of Anne is certainly not limited to non-subjects. The Prussian Courts, in a case which arose in 1888 with respect to a coachman hired by the French ambassador, appear to have held that the mere fact of the accused being a Prussian subject excluded him from the privilege claimed. The United States Government seems to adopt, or at any rate to sanction, this rule (t). In England it has been held by Mathew, J., with respect to actual members of a foreign embassy, that they are entitled to the privilege, although they happen to be British subjects, unless received by the British Government upon the express condition that they should be subject to the local jurisdiction (u).

CONSULS.

Consuls.—Consuls, though entitled by international law to certain privileges and exemptions, occupy a position entirely different from that held by ambassadors, Ministers, and *chargés d'affaires*. They are not *representatives* of the State to which they belong, nor are they *accredited* to the State to which they act as consuls. Their duties are discharged under a commission from the State for which they act, which requires the permission and confirmation (by *exequatur*) of the State in which their duties are to be performed (x).

The privileges and exemptions of consuls are : (1) safe conduct; (2) exemption from personal taxes and obligations, including military service (y); (3) exemption from having soldiers billeted or quartered in his house; (4) exemption from excise or inland duties on liquors and other articles of consumption, for himself and his family (z); (5) inviolability with respect to the papers and muniments of the consulate. It has been said that they are exempt from arrest and imprisonment either under civil

(s) Phillimore, *Int. Law*, vol. ii. (1882), p. 264.

(t) See *Law Magazine and Review*, August, 1889, p. 365; Wharton, *Int. Law of the U. S.*, vol. i., p. 644.

(u) *Macartney v. Garbutt* (1890), 24 Q. B. D. 398.

(x) Phillimore, *Int. Law*, 3rd ed. (1882), vol. ii., p. 271.

(y) De Martens, *Guide Diplomatique*, i. 398; Phillimore, *Int. Law*, 3rd ed. ii. p. 279.

(z) So stated in Fynn, *The Consul abroad*, p. 17, cited by Phillimore, *l.c.*; but there seems to be a want of authority.

or military law (a); but this is certainly not in accordance with the English view of international law, and there are several instances in which the contrary has been held. Thus in *Barbuit's Case* (b), in 1737, an attachment was issued against Barbuit for non-payment of an amount found due from him under a decree in Chancery : and upon motion to discharge him it was held that he was not entitled to the immunity claimed.

In a subsequent case decided in 1767, Lord Mansfield said : "The law of nations does not take in consuls or agents of commerce, though received as such by the Courts to which they are employed. This was determined in *Barbuit's Case*, which was solemnly argued before and determined by Lord Talbot, on considering and well weighing Barbeyrac, Bynkershoek, Grotius, Wicquefort, and all the foreign authorities; for there is little said by our own writers on the subject" (c). The same claim to exemption from arrest was again put forward in the case of *Clarke v. Cretico*, decided in 1808, where the defendant relied on the authority of Vattel, already cited. Lord Mansfield did not decide the question, which arose not at common law, but under the statute of Anne; and the rule obtained was eventually discharged on the facts (d). Finally, it was expressly held by Lord Ellenborough in *Viveash v. Becker* (e), in 1814, that a resident merchant of London, appointed and acting as consul to the Duke of Schleswig-Holstein Oldenburg, was not exempt from arrest on mesne process, either under the statute of Anne or under the law of nations.

If possible, says Hall, a consul accused of a criminal offence was to be set at liberty on bail or be kept under surveillance in his own house instead of being sent to prison, where the exercise of his functions is difficult or impossible (ee). In *Rea v. Ahlers*, [1915] 1 K. B. 616, however, the defendant, the German Consul at Sunderland, was arrested and eventually charged with high treason.

In the case of the *Indian Chief* (1800) it was sought to exempt a cargo which had been seized as prize, on the ground that it was the property of the consul at Calcutta for the United States; but Lord Stowell said that it was fully established that the character

(a) Vattel, *Droit des Gens*, Tit. i. l. ii., c. ii., s. 34.

(b) *Barbuit's Case* (1737), Talb. Cases in Eq. 281. Barbuit was an "agent for commerce" to Great Britain under a commission from the King of Prussia, which was treated by Lord Talbot, C., as making his employment to be in the nature of a consul. This case was cited by Lord Mansfield in *Triquet v. Bath* (1764), 1 Taunt. 107.

(c) *Heathfield v. Chilton* (1767), 4 Burr. 2016.

(d) *Clarke v. Cretico* (1808), 1 Taunt. 106.

(e) *Viveash v. Becker* (1789), 3 M. & S. 284, where Lord Ellenborough collects and reviews the authorities.

(ee) Int. Law, § 105.

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of consul did not protect that of merchant united in the same person (*f*). The cargo, therefore, fell under the ordinary rule which renders all property liable to seizure as enemy property which is the subject of trade adventure with the enemy (*g*).

With regard to the *domicil* of consuls, mere residence as a consular officer in a foreign country gives rise to no inference of domicile in that country; but a person already domiciled in a country does not destroy or abandon such domicile by becoming a consul in it for a foreign State (*h*). Story (Conflict of Laws, § 48) says that ambassadors and foreign Ministers retain their domicile in the country which they represent, and to which they belong; but that a different rule generally applies to consuls who are presumed to remain in a country for purposes of trade, and therefore acquire a domicile where they reside. The distinction is not in accordance with the cases cited below, and the true expression of the rule would seem to be that mere residence *quâ* consul gives rise to no such presumption or inference, but that the consular character does not prevent a man from acquiring a domicile in the country where he acts as consul.

It has been decided that a plaintiff, residing abroad as British Consul, will not be ordered to give security for costs; and the same benefit seems to apply to all persons resident abroad in an official capacity on the public service (*i*).

The rights, duties, privileges, and jurisdiction of consuls in Mahomedan and other non-Christian States rest almost wholly upon treaties and concessions, and their discussion does not fall within the limits of this treatise (*k*).

(*f*) *The Indian Chief* (1800), 3 C. Rob. 26.

(*g*) *The Carolina* (1802), 4 C. Rob. 256; *The Harmony* (1800), 2 C. Rob. 322; *The Orozemba* (1807), 6 C. Rob. 430.

(*h*) *Sharpe v. Crispin* (1868), L. R. 1 P. & D. 611; *Heath v. Samson* (1851), 14 Beav. 441; *Att.-Gen. v. Kent* (1862), 1 H. & C. 12; *Udny v. Udny* (1869), L. R. 1 H. L. Sc. 441.

(*i*) *Colebrook v. Jones* (1751), 1 Dick. 154; *Evelyn v. Chippendale* (1839), 9 Sim. 497; *Nugent v. Harcourt* (1834), 2 D. P. D. 578; *Evering v. Chiffenden*, 7 D. P. C. 536; *Plowden v. Campbell* (1854), 23 L. J. Q. B. 384; *Stanley v. Hume*, 1 Hog. 12. The same rule is applied to officers in the Navy or Army.

(*k*) See for information on this subject, Phillimore, *Int. Law*, 3rd ed., ii., p. 337; and Hertslet's *Commercial Treaties*.

APPENDIX TO CHAPTER V.

7 Ann., cap. 12.

An Act for preserving the privileges of Ambassadors and other publick Ministers of Foreign Princes and States.

Whereas several turbulent and disorderly persons having in a most outrageous manner insulted the person of His Excellency *Andrew Artemonowitz Mattucoff*, Ambassador Extraordinary of his Czarish Majesty, Emperor of Great Russia, her Majesty's good friend and ally, by arresting him, and taking him by violence out of his Coach in the publick Street, and detaining him in custody for several hours, in contempt of the Protection granted by her Majesty, contrary to the Law of Nations, and in Prejudice of the rights and privileges which Ambassadors and other publick Ministers, authorized and received as such, have at all times been thereby possessed of, and ought to be kept sacred and inviolable;

Be it therefore declared by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in Parliament assembled, and by the Authority of the Same, That all Actions and Suits, writs and processes commenced, sued or prosecuted against the said Ambassador, by any person or persons whatever, and all Bail Bonds given by the said Ambassador, or any other Person or Persons on his behalf, and all Recognizances of Bail given or acknowledged in any such Action or Suit, and all Proceedings upon or by Pretext or Colour of any such Action or Suit, Writ or Process, and all Judgments had thereupon, are utterly null and void, and shall be deemed and adjudged to be utterly null and void to all Intents, Constructions, and Purposes whatsoever.

2. And be it enacted by the Authority aforesaid, that all Entries, Proceedings and Records against the said Ambassador or his bail, shall be vacated and cancelled.

3. And to prevent the like Insolences for the future, Be it further declared by the Authority aforesaid, that all Writs and Processes that shall at any time hereafter be sued forth or prosecuted, whereby the Person of any Ambassador, or other publick Minister of any Foreign Prince or State, authorized and received as such by her Majesty, her Heirs or Successors, or the Domestick or Domestick Servant of any such Ambassador or other Publick Minister, may be arrested or imprisoned, or his or their goods or Chattels may be distrained, seized, or attached, shall be deemed and adjudged to be utterly null and void, to all Intents, Constructions and Purposes whatsoever.

4. And be it further enacted by the Authority aforesaid, that in case any Person or Persons shall presume to sue forth or prosecute any such Writ or Process, such Person and Persons, and all Attornies and Solicitors prosecuting and Soliciting in such case, and all Officers executing any such Writ or Process, being thereof convicted, by the confession of the Party, or by the Oath of one or more credible Witness or Witnesses, before the Lord Chancellor, or Lord Keeper of the Great Seal of Great Britain, the Chief Justice of the Court of Queen's Bench,

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the Chief Justice of the Court of Common Pleas for the time being, or any two of them, shall be deemed Violators of the Law of Nations, and Disturbers of the Publick Repose, and shall suffer such Pains, Penalties, and corporal Punishment, as the said Lord Chancellor, Lord Keeper, and the said Chief Justices, or any two of them, shall judge fit to be imposed and inflicted.

5. Provided, and be it declared, that no Merchant, or other Trader whatsoever, within the description of any of the Statutes against Bankrupts, who hath or shall put himself into the Service of any such Ambassador or Publick Minister, shall have or take any manner of Benefit by this Act; and that no person shall be proceeded against as having arrested the Servant of an Ambassador or publick Minister, by virtue of this Act, unless the Name of such Servant be first registered in the Office of one of the Principal Secretaries of State, and by such Secretary transmitted to the Sheriffs of London and Middlesex for the time being, or their Under-Sheriffs or Deputies, who shall, upon the Receipt thereof, hang up the same in some publick place in their Office, whereto all persons may resort, and take Copies thereof, without Fee or Reward.

6. And be it further enacted by the Authority aforesaid, That this Act shall be taken and allowed in all Courts within this Kingdom as a publick Act; and that all Judges and Justices shall take notice of it without special pleading; and all Sheriffs, Bailiffs, and other officers and Ministers of Justice, concerned in the execution of Process, are hereby required to have regard to this Act, as they will answer the contrary at their Peril (1).

(1) The facts which led to the passing of this statute are narrated by Lord Mansfield, in *Triquet v. Bath* (1764), 3 Burr. 1478.

Part II.—PROPERTY.

CHAPTER VI.

IMMOVABLE PROPERTY.

(i.) JURISDICTION AS TO IMMOVABLE PROPERTY
SITUATED ABROAD.PART II.
PROPERTY.

CAP. VI.

Prevalence of
the *lex situs*.

THE primary principle of private international law with relation to land, regarded as property, is that the *lex situs* or *lex loci rei sitæ* (a)—that is, the law of the country of which the land in question forms an integral part—is the only law which can or ought to affect it. If real property could always be regarded in this simple light, freed from its many complicated relations with the contracts, acts, and capacities of persons, no conflict of law would ever arise with regard to it; but these necessary relations have brought about considerable modification in the primary principle just laid down. The principle itself arises from the conception of international law known as *eminent domain*, by which is meant that the proprietary right of every sovereign State is not only *absolute* within its territorial limits, so as to exclude that of other nations, but also paramount with respect to the members of the State itself, so as to include the right, in case of necessity or for the public safety, of disposing of all the property of every kind within the same limits (b). It need hardly be pointed out that in England such a theory must be regarded as derived directly from the feudal law, according to which the right of the Crown over its territory was, in the first instance, *absolute*, not only to the exclusion of other Sovereigns, but also of its own subjects, who afterwards obtained their qualified rights in the soil by its mere grace and favour. From the conception itself it naturally follows that the title to real property can be acquired, passed, and lost only according to the

(a) The late editor discontinued the use of the expression *lex rei sitæ*, signifying the law of the place in which the thing in question is situated. *Lex* is, of course, intended to refer to some particular place, and not to a thing; hence the phrase *lex loci rei sitæ* is at once more logical and more precise. The shorter expression *lex situs* is more convenient. On the other hand, *forum rei sitæ* is not open to the same objection, because *forum* can well be taken to mean the place of jurisdiction.

(b) Wheaton, Int. Law (1904), § 163, p. 260.

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*Jurisdiction
as to Land.*Real and
personal
laws.Foreign land
affected by
English
decrees in
personam.

law of the Sovereign who has such paramount domain over it (c); and an additional reason for the principle, independent of theory, arises from the obvious fact that no other sovereign State has the power of employing force to execute such of its laws, or such of the decrees of its tribunals, as affect to deal with land situated beyond its own limits. It was even held, in *Musgrove v. Chun Teeong Toy*, [1891] A. C. 272, that an alien has no right enforceable by action to enter within the territory of a strange Sovereign, though his exclusion might be such an infringement of international comity as would properly give rise to diplomatic remonstrance from the State to which he belonged.

The distinction between real and personal laws, so much insisted upon by the older jurists, is not of any importance in connection with this division of the subject; and would rather lead to embarrassment, as, in the phraseology of the jurists alluded to, *real* laws are those "*quæ disponunt circa res*," *personal* laws, those "*quæ disponunt circa personas*" (d), and the word "*real*" is used, not to distinguish immovable from movable property, but property generally from persons. As to immovables, however, Story says that in the main proposition as to the prevalence of the *lex situs*, foreign jurists generally concur (e). It remains to see what modifications of the rule are accepted in English law.

As regards the right either to the possession of or the property in land, not only must the *lex situs* prevail, but the *forum situs* is the only one in which such a right can be tried; and in accordance with this principle, the English Courts never assume jurisdiction to deal directly either with the possession or property in foreign realty (f). Thus, a suit for discovery, in aid of proceedings about to be taken abroad to recover foreign land, cannot be entertained here (g). But where the foreign land can be acted upon indirectly through a person who has placed himself within the jurisdiction, the English Courts, acting *in personam* and not *in rem*, will make decrees, upon the ground of a contract or other equity subsisting between the parties, respecting property situated out of the jurisdiction (h). "The cases clearly

(c) Story, Conflict of Laws, § 424.

(d) Bartolus, ad Cod. I. 1.

(e) Story, Conflict of Laws, § 427.

(f) Story, Conflict of Laws, § 428; Westlake, Priv. Int. Law (1922), p. 207.

(g) *Reiner v. Marquis of Salisbury* (1876), 2 Ch. D. 378 (where Malins, V.-C., said (p. 385): "If then this bill is for discovery in aid of a suit which cannot be entertained in this Court, that is, if the plaintiff does not show a title to sue, he shows no title to discovery"); *Doss v. Secretary of State for India* (1875), 19 Eq. 509; and cases cited *infra*, p. 226.

(h) *Penn v. Baltimore* (1750), 1 Tudor, L. C. (1910), 800; 1 Ves. Sen. 444; *Ewing v. Orr-Ewing* (1883), 9 App. Cas. 40; *Scott v. Nesbitt* (1808), 14 Ves. 438; *Maunder v. Lloyd*, 2 J. & H. 718.

show, that with regard to any contract made or equity between persons in this country respecting lands in a foreign country, particularly in the British dominions, this Court will hold the same jurisdiction as if they were situated in England. . . . The only distinction is, that this Court cannot act upon the land directly, but acts upon the conscience of the person living here" (i). Thus, a foreclosure decree being a decree *in personam* depriving the mortgagee of his personal right to redeem, the English Court of Chancery has jurisdiction to make such a decree in respect of a mortgage, between an English mortgagor and a mortgagee, of land in the colonies (k). In that case Bacon, V.-C., said: "As I am satisfied that jurisdiction has been very often assumed in the case of appointing receivers of mortgaged estates in the colonies, and as I cannot doubt that the Court has a right as between the English mortgagor and the English mortgagee to enforce a personal contract between them, although one of the consequences of so doing may be to vest in the plaintiff the absolute interest in the mortgaged estate, which at present is qualified only by the existence of the equity of redemption, I cannot hesitate for a moment in saying that the suit, which is brought for the purpose of having the account taken, of realising the estate if it should be necessary, and giving to the mortgagee the opportunity of redeeming it if he thinks fit to do so, is properly brought in this court. Upon the question of jurisdiction, there is, in my opinion, no reason whatever for doubt." The judgment of Lord Romilly in *Norris v. Chambres* (l) was relied upon in denial of the jurisdiction, but in that case the attempt was to obtain an enforcement of lien on an estate in Prussia belonging to a stranger, independently (as Lord Romilly expressly said) of all personal equity attaching upon him. And in the same case, on appeal, Lord Campbell said that, had any contract or privity been proved, the plaintiff would have been entitled to succeed (m), further laying down that an English Court ought not to pronounce a decree, even *in personam*, which can have no specific operation without the intervention of a foreign Court, and which, in the country where the lands lie which it assumes to charge, would probably be treated as a

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Mortgages.

Conditions
necessary for
the exercise
of this
jurisdiction.

(i) Per Sir R. Arden, M.R., in *Cranstown v. Johnson* (1796), 3 Ves. 170. See cases there cited.

(k) *In re Hawthorne, Graham v. Massey* (1883), 23 Ch. D. 743; *Paget v. Ede* (1874), L. R. 18 Eq. 118, 126; *Toller v. Carteret* (1705), 2 Vern. 494. So a receiver may be appointed over lands abroad [Seton, ii. 16, s. 4 (4th ed.), and cases there cited]; though it is said that such appointment is in the nature of a recommendation to the foreign Court (Seton (4th ed.), p. 425). And obviously, an order directing foreign tenants to attorn will be bad: *In re Trant*, 2 Sol. Journ. 11.

(l) (1860), 30 L. J. Ch. 285.

(m) (1860), 3 D. F. & J. 584.

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as to Land.*

The *lex situs*
predomi-
nates.

brutum fulmen. In *Mercantile Trust Co. v. River Plate Trust Co.*, [1892] 2 Ch. 303 (n), where a receiver was applied for over mortgaged lands in Mexico belonging to an English company, North, J., refused to appoint a receiver, for reasons other than the *situs* of the land, but intimated that the company itself, and every officer of it who took part in the proceedings, would be personally responsible to the Court for any misapplication of the funds arising out of the lands.

It is, of course, manifest that however a personal decree may be enforced in this country, the *lex situs* must be resorted to in order to give the plaintiff possession (o). And in accordance with these principles, a bill cannot be maintained in England to administer the trusts of a Scotch creditor's deed, under which a mining business in Scotland was to be carried on by a trustee (p). In the case last cited, Lord Romilly laid down that the Court would never interfere with a contract unless the domicile of the defendant, or the situation of the subject-matter, or the place which the contract was entered into, warranted such interference; unless, that is, it was the *forum domicilii*, the *forum rei sitæ*, or the *forum loci contractus celebrati*. This case was subsequently followed by Malins, V.-C., who allowed a plea to the jurisdiction where the contract had been entered into at Boulogne, between the plaintiff, who was resident there, and an Irishman, relating to real property in Ireland (q). Unless, therefore, the person on whom it is sought to enforce an equity regarding foreign land is domiciled in England, or has entered into a contract in England respecting the same property, the Court will not assume jurisdiction to compel him to do any act with regard to it (r). And the validity or effect of a contract to transfer immovables was held by Jessel, M.R., to depend upon the *lex situs* (s), as of course the penalties must do (t). So

(n) *Duder v. Amsterdamsch, etc., Trustees*, [1902] 2 Ch. 132. Permission has been granted to serve notice of a writ on a Dutch Corporation abroad, in an action to enforce an equitable charge upon lands in Brazil, of which other defendants in England were the owners, and which were vested in the Dutch Corporation as trustees. It will be seen that the English Court had no personal jurisdiction over the Dutch Corporation, and it may be doubted whether any effectual order could have been made against them. The Judge (Byrne, J.) decided the case as one of procedure only, under Order xi. r. 1 (g), treating the Dutch Corporation as "necessary and proper parties to an action properly brought against some other person duly served within the jurisdiction." Cf. *Bawtree v. Great N. W. Central Ry Co.* (1898), 14 L. T. Rep. 448.

(o) *Penn v. Baltimore* (1750), 1 Tudor, L. C. (1910), 800, at p. 823.

(p) *Cookney v. Anderson* (1862), 31 Beav. 452.

(q) *Blake v. Blake* (1870), 18 W. R. 944; *Re Holmes* (1861), 2 J. & H. 527.

(r) *Matthæi v. Galitzin* (1874), L. R. 18 Eq. 340. As to the proper *forum* in which to recover a debt made a charge on foreign territory (*Oude*), see per Malins, V.-C., *Doss v. Secretary of State for India* (1875), L. R. 19 Eq. 509, 535.

(s) *Norton v. Florence Land, etc., Co.* (1877), 7 Ch. D. 332, 336.

(t) *Adams v. Clutterbuck* (1883), 10 Q. B. D. 403.

the Court has refused to entertain a suit in England to determine the right to the proceeds of foreign immovables, the title to which was disputed (*u*). But an order made by the Supreme Consular Court at Constantinople that the receiver appointed of a partnership between English subjects should sell by auction land in Turkey held by the partners in the name of a Turkish subject, was held to be not *ultra vires* (*x*). The Court undoubtedly had jurisdiction *in personam*, but a protocol had been issued by the Turkish Government—of which the partners had not availed themselves—enabling for the first time British subjects to hold land in Turkey, but declaring that they should then be amenable to the Turkish Courts only in regard to all questions relating to it. The Consular Court, however, being the proper one to control the persons of the parties, it was held immaterial that the Turkish Government assumed to itself all jurisdiction in respect of real estate in Turkey held by them, either in their own names or in that of a Turkish subject.

In the case of *Re Holmes* (1861), 2 J. & H. 527, which was one of petition of right, a demurrer was allowed on the ground, *inter alia*, that the Queen was as much resident in Canada as in England, and that the subject-matter of the petition being Canadian land, the Canadian Court was the proper *forum* in which to sue. The suppliants there sought to establish the jurisdiction of the Court by applying the principle laid down in *Penn v. Lord Baltimore* (1750), 1 Ves. Sen. 444, as to the power of equity to affect foreign land by acting *in personam* of its justiciaries, to her Majesty, by virtue of the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), s. 1, which enacts that a petition of right may be intitled in any one of the superior Courts in which the subject-matter of such petition would have been cognizable, if the same had been a dispute between subject and subject. The decision of Lord Hatherley, however, rested on the broad ground that, for the purpose of any claims to Canadian lands under Canadian statutes, the Queen was not to be regarded as within the jurisdiction of the Court, and that it was not the object of the Petitions of Right Act, 1860, to transfer jurisdiction to this country from any colony in which an Act might be passed vesting lands in the Crown for the benefit of the colony (*y*). And in *Reiner v. Marquis of Salisbury* (1876), L. R. 2 Ch. D. 378, it was decided that a bill of discovery could not be maintained in England, in aid of proceedings about to be taken in England for the recovery of land in India, intended to

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as to Land.*Colonial land
not to be
affected by
petition of
right in
England.(*u*) *In re Hawthorne, Graham v. Massey* (1883), 23 Ch. D. 743.(*x*) *Abbott v. Abbott* (1860), 29 L. J. (N.S.), P. M. & A. 57.(*y*) See *Doss v. Secretary of State for India* (1875), 19 Eq. 509.

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as to Land.*

English
Court
acts upon
conscience
of its
justiciable.

Foreign and
colonial land
on same
footing,

and can only
be reached
through a
personal
equity.

be by petition of right, on the ground that a plaintiff must show a title to sue in order to obtain discovery, and that he could not sue for the Indian lands in an English Court.

In *Cranstown v. Johnston* (z) a sale of real estate in one of the West Indian islands by a creditor who had fraudulently obtained a judgment there against an absent debtor was set aside. The Master of the Rolls in that case said, "It was not much litigated that Courts of Equity here have an equal right to interfere with regard to judgments or mortgages upon lands in a foreign country as upon lands here. . . . The only distinction is, that this Court cannot act upon the land directly, but upon the conscience of the person living here : *Archer v. Preston*, cited, 1 Vern. 77; *Arglasse v. Muschamp*, 1 Vern. 75; *Kildare v. Eustace*, 1 Vern. 419, and 1 Eq. Cas. Ab. 133. These cases clearly show, that with regard to any contract made by, or equity between, persons in this country respecting lands in a foreign country, particularly in the British dominions, this Court will hold the same jurisdiction as if they were situated in England; and Lord Hardwicke lays down the same doctrine in *Foster v. Vassall*, 3 Atk. 589."

The distinction alluded to by Sir R. Arden, M.R., in the quotation just made, between lands situated within the empire or colonies and lands wholly foreign, derives some support from the language used in *Foster v. Vassall* (1747), 3 Atk. 589, but does not appear to have any other foundation. In *Angus v. Angus* (1737), West's Rep. 23, where a bill was filed relating to lands in Scotland, Lord Hardwicke said that, since the Court acted upon the person, it would have been a good bill, as to fraud and discovery, *if the lands had been in France*, if the person were resident in England. All lands out of the jurisdiction stand upon the same footing (a), and as to these, there are abundant examples of equities being enforced. There must, however, be an equity which the English Court can lay hold of, and this principle is well explained by Lord Selborne in *Harrison v. Harrison* (1873), 8 Ch. App. 342. That was a case where a Scotch heir elected to take the Scotch real estate by inheritance in opposition to an English will, under which he would have been entitled to a legacy, and it was held on appeal that the liability of the Scotch real estate to the payment of debts, as between the heir and the legatees, was to be determined by the Scotch law. It followed that as the Scotch law threw the general debts primarily on the real estate, there could be no marshalling in the English Court against the Scotch heir in favour of the pecuniary

(z) (1796), 3 Ves. 170; S. C. 5 Ves. 277; *Jackson v. Petrie* (1804), 10 Ves. 164.

(a) *Roberdean v. Rous* (1738), 1 Atk. 343.

legatees, and the Scotch real estate was further exempted from any share in the general costs of the suit. Lord Selborne said in his judgment: "The doctrine of marshalling as applied in favour of legatees against heirs-at-law taking descended real estate in England is part of the *lex loci* affecting those real estates, and no question of conflict of law can arise under those circumstances. It is a wholly different thing when persons who have an interest in the personal estate only endeavour indirectly to establish in their own favour, or for their own relief, a burthen upon real estate situate in another country, which, by the law of that country, would not be administered so as to give them what they ask. . . . The legatees ask that by virtue of the English doctrine of equity, applicable to the administration of English real estate descended when personal legatees would be disappointed by the payment of creditors out of their fund, these legatees may be declared entitled to acquire the rights of creditors against the Scotch real estate. It is clear that in Scotland they would have no such right; and to me it seems equally clear that unless they have such a right in Scotland the law of England cannot give it to them. It is admitted, as I understand, that the burthen of liability to debts, so far as relates to real estate, can only be created by the *lex loci rei sitæ*; but it is suggested that the burthen may be laid on real estate on which it is not imposed by the *lex loci rei sitæ* by an indirect equity in favour of the legatees, because the creditors who have been paid might have pursued their own rights against the real estate without waiting, in the first instance, to see whether there was personal estate or not. It seems quite impossible that this can be correct; because, in the first place, as against the real estate in Scotland, the Courts of England have no jurisdiction at all. *Any jurisdiction which they can exercise as to the real estate in Scotland can only be through the medium of some personal equity attaching to the owner in Scotland of that real estate, who, in this case, is the Scotch heir? What is that personal equity?* There is no fiduciary relation. What right have these legatees, upon the footing of personal equity, to say that the heir shall not enjoy the Scotch real estate as the law of Scotland gives it to him, or that any burthen shall directly or indirectly be thrown upon that real estate in their favour, which would not be imposed by the law of Scotland? *It seems to me quite clear that this Court cannot found any such equity upon the accident of this heir-at-law being before it as a party to the suit.* The equity must be founded upon some higher principle. The fallacy which pervaded the whole of the argument for the respondent was this, that it was assumed that the Scotch estate was properly brought into

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Equity must arise from some contract or trust creating a privity between the parties cognizable by an English Court.

this court as the *forum* of administration. But without first showing what this Court has to do with respect to the Scotch real estate, and why it ought to be done, the proposition is not made out. *There are, in point of fact, no debts to be paid out of the Scotch real estate; there are no trusts to be executed as to the Scotch real estate; there is no contract to be enforced as to the Scotch real estate."*

The rule which is therefore to be drawn from the decision of Lord Selborne just quoted (with which Lord Justice Mellish concurred), is that, in order to affect real estate situate abroad with an equity which does not attach to it by the *lex loci rei sitæ*, there must be a privity shown to exist between the parties seeking to establish the equity and the owner of that real estate, and that it must be a privity which arises either from contract or from the existence of a fiduciary relation between the parties. According to the case just cited (*b*), it is also necessary that the defendant at least should be domiciled in this country, or that the contract out of which the privity arises should have been entered into here. It may probably be laid down as a principle, as it is certainly demanded by the very nature of sovereignty, that the jurisdiction of the English Courts will not be exercised as to persons domiciled abroad, and as to their conduct abroad, even though process may have been served on them here (*c*). And this being a general rule, it would be so *à fortiori* in cases relating to real estate situate abroad, which there would be no pretence for affecting indirectly through the person of the owner, unless that owner were either domiciled within the jurisdiction, or had entered into a contract within its limits in relation to the real estate which it was sought to affect.

But a distinction has been drawn as to those cases where the *lex situs* positively excludes the operation of the equitable doctrine on which the English Court is asked to act *in personam*. In such a case the English Court will decline to interfere, in accordance with the dictum of Lord Campbell (cited above), that a decree should not be made which would be treated in the *situs* as a *brutum fulmen* (*d*).

Subject to these restrictions, there have been abundant examples of equities being enforced in relation to real estate situate abroad. Thus, trusts will be enforced, though affecting

Equities
enforced.

(*b*) *Cookney v. Anderson* (1862), 31 Beav. 452; *Blake v. Blake* (1870), 18 W. R. 944; *Matthæi v. Galitzin* (1874), 18 Eq. 340.

(*c*) See the cases cited in *Hendrick v. Wood* (1863), 9 W. R. 588.

(*d*) *Martin v. Martin* (1831), 2 R. & My. 507; and per Lord Campbell in *Norris v. Chambres* (1860), 3 De G. F. & J. 584, 585; *Ex parte Pollard* (1840), Mont. & Ch. 239; *Re Scheibler, Ex parte Holthausen* (1874), 9 Ch. App. 722; *Coote v. Jecks* (1872), 13 Eq. 597.

foreign lands (*e*), accounts taken between tenants in common for waste and generally (*f*), and contracts for sale ordered to be specifically performed (*g*). But foreign boundaries will not be settled (*h*), nor will partition of foreign lands be decreed (*i*), nor will an issue be directed to try the validity of a will of lands lying out of the jurisdiction (*k*), nor will discovery be granted in aid of a suit abroad to recover foreign land (*l*), nor will mortgagees of foreign realty be restrained from suing in the country where it is situate to enforce their security, although the mortgagor is a company in process of being wound up in England (*m*). The ground of the last decision appears to have been, that the party asking for the injunction could appear before the foreign tribunal, and assert his rights there, the proceedings abroad being also prior in point of date. There was, however, authority cited for restraining a foreign action under analogous circumstances, where immovables were not concerned (*n*). On similar principles, a suit to enforce a lien on real estate in Prussia cannot be sustained unless there is some privity of contract between the parties to it. In such a case, a declaration of lien will be made, and the Court will in some cases appoint a receiver; but it will be left to the plaintiff to make it available, if he can, by means of the foreign tribunals (*o*). For the general rule is that it is for the *lex loci rei sitæ* to decide whether or not a contract to assign an immovable creates any interest in the land (*p*). In *Re Holmes* (1861), 2 J. & H. 527, certain lands in the colonies were vested in the Queen by an Act of the Provincial Legislature, and it was held that the Courts of this country, acting *in personam*, had not jurisdiction to entertain a petition of right in respect of such

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(*e*) *Kildare v. Eustace* (1686), 1 Vern. 422.

(*f*) *Carteret v. Petty* (1676), 2 Swans. 323, n.; *Roberdean v. Rous* (1738), 1 Atk. 543.

(*g*) *Archer v. Preston* (c. 1682), 1 Vern. 77 (cited in *Arglasse v. Muschamp* (1682); *Jackson v. Petrie* (1804), 10 Ves. 164; see note to *Penn v. Baltimore* (1750), 1 Tudor, L. C. (1910), 800, for further examples.

(*h*) *Penn v. Baltimore* (1750), 1 Ves. Sen. 444; see *Tulloch v. Hartley* (1841), 1 Y. & C. C. C. 114.

(*i*) *Cartwright v. Pettus* (1672), 2 Ch. Cas. 214.

(*k*) *Pike v. Hoare* (1736), 2 Eden, 182.

(*l*) *Reiner v. Salisbury* (1876), 2 Ch. D. 378.

(*m*) *Moor v. Anglo-Italian Bank* (1879), 10 Ch. D. 681.

(*n*) *Ex parte Tait* (1872), L. R. 13 Eq. 311. In *Ex parte Rogers, In re Boustead* (1881), 16 Ch. D. 665, 767, it seems to have been thought that the leave of the Court of Bankruptcy ought to have been obtained before issuing a colonial sequestration against real estate of the bankrupt in a colony. Persons who have submitted to the jurisdiction by appearing as petitioners, or proving as creditors, in the winding-up of a company, will, however, be restrained from proceeding abroad: *In re Belfast Shipowners* (1894), 1 L. Rep. 321; *In re Oriental Co.* (1874), 8 Ch. 557. See Part IV, chap. xi, *infra*.

(*o*) *Norris v. Chambers* (1860), 30 L. J. Ch. 285.

(*p*) Cf. also *Deschamps v. Miller*, [1908] 1 Ch. 856, where it was held that a covenant in a French marriage settlement to assign after-acquired property did not affect a purchaser who acquired a good title by Indian law to such property situated in India.

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as to Land.*Abolition
of rules of
venue.

lands, praying for a reconveyance of part of them to the suppliants on equitable grounds. A power was formerly assumed of granting sequestrations against the estates of defendants situated in Ireland (*q*), but these cases are of doubtful authority, and the observations of Lord Brougham on the judgment in the latter case, in *Portarlington v. Soulby* (1834), 3 My. & K. 108, show that they would not now be followed. In the later case of *Whitaker v. Forbes* (1875), 1 C. P. D. 51, it was held that an action of debt for a rent-charge on lands situate in Australia was not maintainable in England, but this was on the ground that such an action was local and not transitory in its nature, and that the rules of venue, which had not then been abolished, would prevent it from being tried anywhere but in the *forum situs*. It was contended in that case, in the argument on appeal, that the rule as to an action for rent-charge being local did not apply to cases where the land was situated out of England; but Lord Cairns denied that there was, either in principle or authority, any ground for such a proposition. In *Phillips v. Eyre* (*r*) Willes, J., said: "Our courts are said to be more open to admit actions founded upon foreign transactions than those of any European country; but there are restrictions in respect of locality, which exclude some foreign causes of action altogether—namely, those which would be local if they arose in England, such as trespass to land (*Doulson v. Matthews*, 4 T. R. 503)." These particular restrictions, in respect of venue, have now been removed by the Judicature Act, 1875, Order xxxvi. r. 1. In the case of *Buenos Ayres Railway Co. v. Northern Railway of Buenos Ayres Co.* (*s*), the plaintiff and defendant companies were both registered and had their offices in England, and the action was brought on a contract for the use and occupation of land and buildings within the dominions of the Argentine Republic. The statement of defence alleged these facts, and further, that both companies were domiciled in the Argentine Republic, where the alleged contract was made, and that the Government of that State had "assumed jurisdiction" in the matter. It was contended that, as the claim of the plaintiffs related to immovable property and rights incident to immovable property situated in a foreign country, the High Court of Justice had not jurisdiction over the same, and that for it to assume to adjudicate thereon would under the above circumstances be a

(*q*) *Arglasse v. Muschamp* (1682), 1 Vern. 75; *Fryer v. Bernard* (1724), 2 P. Wms. 261.

(*r*) (1870), 6 Q. B. 1, 28. See now *British South Africa Co. v. Companhia de Moçambique*, [1893] A. C. 602; *infra*, p. 236.

(*s*) (1876), 3 Q. B. D. 210. Cf. *Re Madrid, etc., Co.*, (1849), 3 De G. & S. 127; 3 C. 2 Mac. & G. 169; *Butt v. Monteaux*, 1 K. & J. 98.

violation of the comity of nations. A further contention was set up that the claim could not be conveniently disposed of in England, inasmuch as the contract sued on had been made abroad, and was therefore subject to the law of the *locus contractus*. This defence was held bad on demurrer, Mellor, J., saying that there was nothing in it to establish that jurisdiction over the subject-matter of the claim was, either by law or by contract of the parties, vested exclusively in the Courts of the Argentine Republic.

It was said above that trusts respecting lands out of the jurisdiction will be enforced by the Court of Chancery, but this will obviously be so only when the trustees are persons on whom the Court can effectually act, and if there are no such trustees, no trust can be settled or enforced. In *New v. Bonaker* (1867), L. R. 4 Eq. 655, a testator gave certain funds to the President and Vice-President of the United States and the Governor of Pennsylvania, to build and endow a college for special purposes in Pennsylvania. The trustees having disclaimed, Malins, V.-C., refused to attempt to settle a scheme for the administration of the trust, and held that the funds bequeathed fell into the residuary estate. The ground, however, of the decision was rather the principle of *Attorney-General v. Sturge* (1854), 19 Beav. 597, that it does not fall within the province or power of the Court to see to the administration of a foreign charity, than the fact that the trust contemplated the acquisition and holding of foreign land for a particular purpose.

With regard to injunctions to restrain proceedings abroad for the recovery of real estate, the Court will grant them at its discretion, if there is reason to believe that all the matters in dispute will be better determined in England, and the parties are before the Court, so as to be controlled by it effectually (t). In the more recent case of *Hope v. Carnegie* (1886), L. R. 1 Ch. 320, a British subject, entitled to real and personal estate, both in England and the Netherlands, died domiciled in England, leaving a will by which he gave to trustees all his property here and abroad, but as to his foreign property only so far as he could dispose of it according to the *lex loci rei sitæ*. A decree was made in England for the administration of his estate, and subsequently one of his children instituted proceedings in the Netherlands for the administration of his real and personal estate in that country. It was held by Knight Bruce, V.-C., that the proceedings in the Netherlands ought to be restrained as to the personal estate, but not as to the realty, leaving them to be carried on separately as to that, if possible; but Turner, V.-C.,

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Trusts
enforced
when
trustees
justiciable.

Interference
with actions
in the *forum
sitæ*.

(t) *Bunbury v. Bunbury* (1839), 1 Beav. 318.

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thought that the proceedings ought to be restrained as to the real estate abroad also, on the analogy of *Bunbury v. Bunbury*.

The balance of authority, however, is certainly against any interference with the *forum situs*, so far as regards realty, though the jurisdiction has always been asserted. The question was much discussed in *Carron Iron Co. v. Maclaren* (u), where the cases on the subject are carefully examined by Lord St. Leonards. In *Bushby v. Munday* (1821), 5 Madd. 297, proceedings in Scotland on a Scotch heritable bond were restrained by Sir John Leach, on the ground that the validity of the bond could best be decided in England; but a similar injunction was dissolved by Lord Eldon in *Kennedy v. Cassilis* (1808), 2 Swan. 313, under the circumstances of that case, though he expressed himself satisfied as to the jurisdiction. So in *Jones v. Geddes* (x), an injunction had been granted against a heritable bond creditor who was proceeding in Scotland against the assignees in bankruptcy of the obligor, who had real estate there. Lord Lyndhurst dissolved the injunction upon a simple consideration of the balance of conveniences and inconveniences of the different courses of action, but here also the jurisdiction was fully recognised. And citing *Elliot v. Lord Minto* (1821), 6 Madd. 16, Lord St. Leonards says: "Of course questions of Scotch law—for example, the right of Scotch estates to be exonerated out of the personal estate—must be decided according to Scotch law; and if practicable, in a complicated case, by the Courts in Scotland." In cases, however, where litigation is pending in England, and complete relief may be had here, the Court of Chancery will restrain foreign proceedings taken by a party to the suit, as a vexatious harassing of the opposite party (y). This was the ground of the decisions in *Harrison v. Gurney* (1821), 2 J. & W. 563, and *Beckford v. Kemble* (1822), 1 Sim. & S. 7. In *Harrison v. Gurney* a decree had been obtained for the execution of the trusts of a deed for the benefit of creditors, and a receiver of real estates in England and Ireland had been appointed. Some of the trustees having filed a bill in Ireland for executing the trusts of the same deed, Lord Eldon restrained them from prosecuting that suit, on the ground that it sought the same relief as might be had under the decree obtained in this country. In *Beckford v. Kemble*, after a decree in this country for an account of a bill to redeem a West Indian mortgage, Sir John Leach would not allow the mortgagee to prosecute a suit in the *forum situs* for foreclosing the same mortgage, on

(u) (1852), 5 H. L. C. 416.

(x) (1845), 1 Phill. 724; *Wedderburn v. Wedderburn* (1840), 4 My. & Cr. 585.

(y) Per Lord Cranworth in *Carron Iron Co. v. Maclaren* (1852), 5 H. L. C.

the ground that full relief might be obtained under the decree in this country. The point arose more recently in *Baillie v. Baillie* (1867), 5 Eq. 175, but though an injunction was granted in that case, Malins, V.-C., expressly said that the question there was only about the personal estate of a domiciled Englishman, and that he was not interfering with any remedy that might exist in Scotland against the real estate situated there of the testator.

A distinction is pointed out by Westlake (z) between cases where the equity binding on the person, and enforced by the English Court, does not exist by the law of the *situs*, and cases where it is absolutely excluded by it. Where the Court acts upon foreign lands, it does so, as explained in *Cranstown v. Johnston* (a), through the conscience of the person whom it has the power and duty of controlling; and it is immaterial if the special equity to be enforced has no existence in the eye of the *lex situs*, with which, as to the kind of remedy applicable to the circumstances, the English law is not likely to coincide. This is seen in the case of *Ex parte Pollard, Re Courtenay* (b), where an equitable mortgage, according to English law, was effected by depositing the title-deeds of real estate in Scotland; and it was held that this mortgage could be enforced, although it was found in the special case that by the Scotch law no lien or mortgage was created by the deposit. The principle of this case was followed in *Ex parte Holthausen, Re Scheibler* (1874), 9 Ch. App. 722, with respect to property situated at Shanghai, in China, though no conflict with the *lex situs* there arose, and the question was whether the contract was to be governed by English or Prussian law, having been entered into by correspondence between parties resident in London and Prussia respectively. But in *Martin v. Martin* (1831), 2 Russ. & My. 507, a post-nuptial settlement of land in Demerara invalid by the law of that colony, was held ineffectual as against a subsequent mortgage with notice, on the ground that the law of Demerara expressly prevented the settlement from operating so as to diminish the absolute ownership and control of the husband and wife over the estate. The principle was substantially the same as that in *Ex parte Borrodaile, Re Rucker* (1835), 2 Mont. & Ayr. 398, where an equitable mortgage, by the deposit of title-deeds, of slaves in Antigua, was declared invalid, on the ground that the laws of the colony declared void the creation of any interest in slaves—at that time real property—unless the title was made apparent by the intervention of certain forms, which in that case had been disregarded. The distinction between this

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enforced if
repugnant
to the *lex
situs*.

(z) Priv. Int. Law (1922), § 172.

(a) (1796), 3 Ves. 170.

(b) (1840), Mont. & Ch. 239; see *Coote v. Jecks* (1872), 13 Eq. 597.

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Injuries
to foreign
immovables
—whether
cognizable
in English
Courts.

case and that of *Ex parte Pollard* just referred to, is apparent on comparing the two. And in *Waterhouse v. Stansfield* (1852), 10 Hare, 254, Turner, V.-C., said that when the law of a foreign country placed a restraint upon the alienation of property situated there, an equity arising here on a contract respecting such property could not be enforced against the *lex loci rei sitæ*.

But in *Concha v. Concha*, [1892] A. C., at p. 675, Lord Macnaghten raised a note of warning when he said: "There is perhaps some danger of doing injustice if the strict rules which the English Court of Chancery has applied to dealings with trust property are applied to a case between foreigners under foreign law, whose relations are not exactly those of trustee and *cestui que trust*."

Trespasses to foreign land give rise to no cause of action cognizable in an English Court; and no legal proceedings based on such trespasses will be entertained, whether for damages, injunction, or a declaration of title (c). Until the year 1875, the question was obscured by the distinction in English law between local and transitory actions, which was finally removed by the Judicature Act; but the decision of the House of Lords, just cited, was based upon general principles, and establishes a definite rule.

The earlier cases were by no means free from ambiguity; and in some of them, at least, the artificial rules of English law as to venue were relied upon, rather than any principles of international law. In *Skinner v. The East India Co.* (d), which was decided in 1665, it was solemnly laid down that no action lay in England for torts to real property or fixtures abroad; but in a subsequent case (e) Lord Mansfield took a distinction between actions concerning the title to or possession of foreign realty, and those for damages based on an injury to foreign realty, and referred to an action which had come before him against a captain in the English navy who had pulled down some houses in Nova Scotia, and which he had ruled was maintainable. In *Doulson v. Matthews* (1792), 4 T. R. 503, however, although Lord Mansfield's dicta were brought before the notice of the Court, they were distinctly overruled, and it was decided again that no action lay in this country for trespass to realty situate abroad. Shortly after the restrictions as to venue were removed, the same question arose in *The M. Moxham* (1876), 1 P. D. 107, where an English company, possessed of a pier in Spain, instituted a cause of damage against an English ship for negligently

(c) *British South Africa Co. v. Companhia de Moçambique*, [1893] A. C. 602.

(d) (1665), cited Cowp. 167.

(e) *Mostyn v. Fabrigas* (1774), Cowp. 180.

injuring it : but the ship having been released from arrest upon an agreement that the liabilities of the parties should be decided in the English Courts, the owners were prevented from setting up any objection to the jurisdiction. In deciding that the law of Spain must govern the case, Mellish, L.J., used the following expressions : “ If that is the rule respecting personal wrongs and respecting wrongs to personal property ”—*i.e.* that no action can be maintained in England for a wrongful act, unless it is wrongful by the law of the country where it was committed, as well as by English law—“ it seems to me *à fortiori* that it must be the rule as to wrongful acts to real or immovable property in a foreign country. Whether the rule as to wrongful acts to immovable property in a foreign country does not go still further, and prevent an action from being brought at all, is a question which it is not necessary to determine in this case; because, having regard to the consent of the parties and the agreement that has been come to, no objection to the jurisdiction could be taken.” And James, L.J., said in the same case, that had it not been for this agreement, very grave difficulties indeed might have arisen as to the jurisdiction of the Court to entertain any action or proceedings whatever with respect to injuries done to foreign soil. It would indeed seem clear that a mere alteration in the rules of procedure in the English Courts could not operate to extend their jurisdiction beyond the limits which were formerly laid down, if those limits were originally defined not only by the necessities of procedure, but by the principles of the law of nations which English law recognises. Whether, however, the law of nations did thus define them appears very doubtful when the unlimited jurisdiction in the case of personal torts, to which the rules of venue did not apply, is considered. And according to Mellish, L.J., it is an established principle that no action can be maintained in the Courts of England on account of a wrongful act either to a person or personal property, committed within the jurisdiction of a foreign country, unless the act is wrongful by the law of the country where it is committed, and also wrongful by the law of this country (*f*). Thus, in *Phillips v. Eyre*, where the liability of the defendant had been taken away, and his wrongdoing purged, by the law of the country where the tortious act was committed, it was held that no action could be brought in this country. This limitation, however, is not one of jurisdiction at all; but results merely from the principle that the tortious nature of an act must be measured by the law of the

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Effect of
abolition
of rules of
venue.

(*f*) Cf. *Phillips v. Eyre* (1870), 6 Q. B. 1; *The Halley* (1867), 2 P. C. 193; *General Steam Navigation Co. v. Guillou* (1843), 11 M. & W. 877, 895; *Mostyn v. Fabrigas* (1774), 1 Sm. L. C. (1903), 591; *Scott v. Seymour* (1862), 1 H. & C. 219; 31 L. J. Ex. 457; *Bullock v. Caird* (1875), 10 Q. B. 276, and *infra*.

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place where it is done, as well as by that of the *forum* where the claim for damages is made (g). According to the last edition of Story (h) it appears to be the American view that an action for personal damages, though founded on a tort to foreign immovables, is not confined to the *forum rei sitæ*. Nor do the reasons given in the English cases before the abolition of venue in any instance go beyond the necessities of English procedure. In the language already cited from the judgment of Willes, J., in *Phillips v. Eyre* (i), there is plainly nothing which necessarily means more than that actions for torts to foreign realty cannot be tried, because the rules of venue prevent them from coming before the Court. In *Mostyn v. Fabrigas* (k) Lord Mansfield pointed out that there is a formal and a substantial distinction as to the locality of trials. The substantial distinction is, where the effect of the judgment cannot be had, if the action is laid in the wrong place. The formal distinction is that which arises from the mode of trial, and excludes certain actions by means of the rules of venue. And by way of example, it was said, that there might be a solid distinction of locality, if an action were brought relative to an estate in a foreign country, where the question was a matter of title only, and not of damages. It can hardly be doubted that the rule as to venue was in Lord Mansfield's mind the only obstacle to the trial by an English Court of an action for injury to foreign realty (l). The execution of the judgment is such an action, inasmuch as it can only be brought when proper service is effected on the defendant, and execution can only issue on his person or property within the jurisdiction, cannot interfere with the sovereign rights of a foreign Power, as it would in an action for the title to or possession of land. An injury to land is in fact a personal injury to its owner, and is no more beyond the jurisdiction of an English Court, on general principles, than other personal injuries are. The real objection to entertaining such an action appears to be that it involves the necessity of deciding as to the title or proprietary right (m).

Service
out of the
jurisdiction.

Service out of the jurisdiction of a writ of summons (or in the case of a non-British subject, notice of the writ) is governed by Order XI. r. 1, of the Supreme Court Rules; which provides as follows :

“ 1. Service out of the jurisdiction of a writ of summons or

(g) *Vide infra*, chap. ix. (ii.).

(h) Conflict of Laws, § 554.

(i) (1870) 6 Q. B. 1, 28; *ante*, p. 232.

(k) (1774), Cowp. 161; 1 Smith. L. C. (1903), pp. 591, 604.

(l) See, however, *Doulson v. Matthews* (1792), 4 T. R. 503.

(m) See the reasoning of Lord Herschell in *British South Africa Co. v. Companhia de Moçambique*, [1893] A. C. at p. 625.

notice of a writ of summons may be allowed by the Court or a judge whenever

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- (a) The whole subject-matter of the action is land situate within the jurisdiction (with or without rents or profits), or the perpetuation of testimony relating to land within the jurisdiction; or
- (b) Any act, deed, will, or contract, obligation or liability affecting land or hereditaments situate within the jurisdiction is sought to be construed, rectified, set aside, or enforced in the action."

The second paragraph in (a) was added by R. S. C. (May), 1912, to meet the decision of the Court of Appeal in *Slingsby v. Slingsby*, [1912] 2 Ch. 21, whereby a claim to perpetuate testimony relating to land within the jurisdiction was held not to be within this order.

It has been held that a contract to pay rent is not a contract, &c., "affecting land" within (b) (n). But where the action sought to recover compensation for tenant right according to the local custom under which the land was demised, it was held to be within the rule, and service out of the jurisdiction was ordered (o).

(ii.) NATURE AND INCIDENTS OF IMMOVABLE PROPERTY AND REALTY.

It has been already said that a general consent exists as to the principle that real or immovable property is subject exclusively to the law of the Government within whose territory it is situate. The authorities cited by Story for this general proposition are very numerous (p), but it will be more advantageous to consider what are the directions in which this *lex situs* is allowed exclusive operation, and how far it extends. It must be sufficiently apparent from the last section that there are many cases in which the exclusive action claimed for it is interfered with.

(a) *Nature of Realty.* The *lex situs*, in the first place, must decide what things and appurtenances are so closely connected with the soil as to partake of the nature of realty, though not themselves *land* in anything but a legal sense. Of these some are so universally regarded in this light, as easements and rent-charges, for example, that no special mention need be made of them; but with regard to other things whose character is more doubtful, it is laid down by Story (q) that the question is not so much what are, or ought to be deemed *ex sua natura*, movables,

*Lex situs
decides
what are
immovables.*

(n) *Agnew v. Usher* (1884), 14 Q. B. D. 78; decided on appeal on different grounds, 51 L. T. Rep. 752.

(o) *Kaye v. Sutherland* (1887), 20 Q. B. D. 147.

(p) Story, *Conflict of Laws*, § 428.

(q) *Ibid.* § 447.

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Distinction
between
movables
and personal
estate.

as what are deemed so by the law of the place where they are situated; and that to ascertain what is immovable property and what is not, recourse must be had in all cases to the *lex loci rei sitæ*. *Ex parte Rucker* (1834), 3 D. & Ch. 704, sometimes cited for the same principle, scarcely seems to bear out the proposition to its full extent, since the decision of Erskine, C.J., turned chiefly upon 5 Geo. 2, c. 7, s. 4, which spoke of negroes as real estate, and not so much upon the fact that they were so by the law of Antigua, where they were situated. It may, however, be taken generally, that the decision of the *lex situs* is universally accepted on such questions (r). In *Chatfield v. Berchtoldt* (s) the question was whether a rent-charge *pur autre vie* issuing out of English land was liable to legacy duty as personal estate under the English statutes (14 Geo. 2, c. 20, s. 9; 1 Vict. c. 26), which makes estates *pur autre vie* applicable as personal estate in the hands of executors and administrators, and it was held on appeal that legacy duty was payable on such rent-charge. The domicile of the testatrix being Hungarian, it was contended in opposition to the Crown that the character of personal property was so impressed by the several statutes upon the interest in question, as to make it for all intents and purposes personal property, attached to the domicile and person of the testatrix, and therefore exempt from legacy duty according to the principle of *Thomson v. Advocate-General* (t). It was held, however, that the English law only made it personal property for the purpose of charging it with legacy duty, and that except in this limited respect, it remained realty. In the words of the judgment, it lay upon the respondent to show that by the law of England estates *pur autre vie* in land had been converted into pure personalty or movables, and he did not discharge this burden by showing that by some statutory provisions in some cases they are to be applied in the same manner as personal estate. But it was taken for granted throughout that the English law was the proper test by which to decide the real or personal nature of the interest in question. Almost the same point arose in *Freke v. Lord Carbery*, [1873] 16 Eq. 461, where it was held that the validity of a testamentary disposition of an English leasehold was governed by the law of England, and not by that of the testator's domicile. In that case a testator domiciled in Ireland (to which the Thellusson Act does not extend) devised an English leasehold to trustees upon trusts to sell and hold the proceeds upon certain trusts for accumulation invalid by the Thellusson Act; and it was held that these trusts

(r) See *Smith v. Brown*, 2 Salk. 666.

(s) (1871), L. R. 7 Eq. 192; see also *Stewart v. Garnett* (1830), 3 Sim. 393.

(t) (1845), 12 Cl. & F. 1; *Wallace v. Att.-Gen.* (1865), 1 Ch. 1.

were invalid so far as regarded the English leasehold, though valid as to the personal estate, which was to be regulated by the law of his domicil. It was contended that the English law regarded leasehold property as personal estate, and therefore remitted all questions concerning it to the decision of the law of the testator's domicil; but Lord Selborne pointed out that this principle, expressed in the Roman maxim "*mobilia sequuntur personam*," referred to *movable* property only, as distinguished from *immovable*; and that although for some purposes the English law regarded leaseholds as chattels, yet land, whether held for a chattel interest or held for a freehold interest, is, as a matter of fact, immovable and not movable. Lord Selborne further cited with approval the *dicta* of Story on this point, which have just been referred to, and there is now no doubt that it expresses the English law on the subject. The doctrine of *Freke v. Carbery* has since been extended to include the formalities of execution, it having been held that a will duly executed by French law in France by a domiciled Frenchman, but not according to the English Wills Act, was ineffectual to pass leaseholds in England (*u*). In the particular case cited, the testator's interest in the leaseholds was equitable only; but the grounds of the judgment obviously include the legal estate. Nor is there any conflict between this rule and the decision in *Hood v. Barrington* (*x*), when it was held that the Scotch executor of a domiciled Scotchman, after having obtained confirmation of the Scotch probate under 21 & 22 Vict. c. 56, s. 12, could sell the English leaseholds. The English statute in that case provided that the confirmation of the Scotch executor "should have the like force and effect in England as if a probate had been granted"; and this obviously included the legal estate in English leaseholds. The *lex situs*, therefore, gave it to the Scotch executor.

The difficulty, if any remains, in this question arises from the loose employment of the terms "personal" and "movable" as synonymous. That they were so originally is of course evident from the maxim itself. *Mobilia sequuntur personam* may be freely translated, "movables are personal property"; but the use of English law has attached a special and definite meaning to the term "personal estate," which differs materially from that more commonly given to it in international jurisprudence. This special meaning is pointed out by Jarman (*y*), who says: "The

(*u*) *Pepin v. Bruyère*, [1900] 2 Ch. 504; affirmed C. A. Nov., 1901; *De Fogassieras v. Duport* (1881), 11 L. R. Tr. 123.

(*x*) (1868), 2 Eq. 218. See note on this case in Jarman on Wills (1910), vol. i. p. 6.

(*y*) Wills. vol. i. p. 4, n. Cf. edition of 1910, pp. 2-5.

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distinction between real and personal estate is peculiar to our own policy, and is not known to any foreign system of jurisprudence that is founded on the civil law, in which the only recognised distinction was between movable and immovable property. Leaseholds for years, therefore, which obviously belong to the latter denomination, though they are with us transmissible as personal estate, are governed by the *lex loci*, and do not follow the person; so that if an Englishman domiciled abroad dies possessed of such property, it will devolve according to the English law." Jarman's subsequent editors appear to have dissented from this proposition, citing other authorities (z) for the ambiguously worded proposition that the *lex loci* must determine what part of the estate is real and what personal, and that then the *lex domicilii* comes in and determines the distribution of that part of the property which the *lex loci* has declared to be personal. All these authorities, however, plainly employ the word "personal" in the very sense against which Jarman's caution is meant to guard, and the point seemed at any rate to have been finally settled by Lord Selborne's judgment, just referred to, in the case of *Freke v. Lord Carbery* (1873), L. R. 16 Eq. 461.

The same question, however, was again revived in *Duncan v. Lawson* (a), where the Court was invited to distinguish *Freke v. Carbery*, on the ground that it had no express reference to devolution or succession. The attempt failed, and it was clearly laid down that, in a case of intestacy, English leaseholds devolved according to the English law (*i.e.* the Statute of Distributions), and not according to the law of the domicile of the intestate, which in that case was Scotch. In other words, leaseholds are immovables for the purposes of succession, and are governed by the *lex loci*. The difficult question, whether this involves the proposition that the doctrine of *Birtwhistle v. Vardill* (b) applies to leaseholds as well as freeholds, and makes the right to succeed to leaseholds dependent upon birth in wedlock as well as legitimacy by the *lex domicilii*, will be found treated elsewhere (c). In *In re Hoyles*; *Row v. Jagg* (d), it was held by the Court of Appeal (Fletcher Moulton, L.J., doubting) that mortgages on land are considered to be of the nature of immovables, and conse-

(z) Wills. vol. i. p. 4, n. (t); 11 Jarm. Blyth, Conv., 3rd ed., p. 15; Deane on Wills, p. 15; *Price v. Dewhurst* (1837), 4 My. & Cr. 81; *Jerningham v. Herbert* (1829), 4 Russ. 388; and *Pearmain v. Twiss*, 2 Giff. 136.

(a) (1889), 41 Ch. D. 394. See, to the same effect, *Re Gentili* (1875), 1. R. 9 Eq. 541; *De Fogassieras v. Duport* (1881), 11 L. R. Ir. 123; *Pepin v. Bruyère*, [1900] 2 Ch. 504; and *Re Moses, Moses v. Valentine*, [1908] 2 Ch. 235.

(b) (1826), 7 Cl. & F. 895.

(c) See note on this subject at the end of chap. vi.

(d) [1911] 1 Ch. 179; 27 T. L. R. 131, C. A.; applying *In re Fitzgerald*; *Surman v. Fitzgerald*, [1904] 1 Ch. 573; *In re Charteris*, [1917] 2 Ch. 257.

quently governed by the *lex loci rei sitæ*. Cozens-Hardy, M.R., observed that the terms "movable" and "immovable" are not regarded as technical terms in English law; they are expressions of convenience used in considering differences between English law and foreign systems. But where the two systems are identical, *quære* whether the terms are appropriate. Farwell, L.J., said that the division into movable and immovable property is no part of the law either of England or of Canada, and is only applied in England when the English Courts have to determine rights between domiciled Englishmen and persons domiciled in countries where the English division of property into realty and personalty is not adopted.

The nature of realty being thus undoubtedly a question which the *lex situs* must decide, it may be added that almost all the incidents which arise in connection with it are to be referred to the same law (e). Thus the liability for deterioration or waste, though it may by accident be enforceable elsewhere *in personam*, is to be decided and measured by the *lex situs* (f). The rules of limitation and prescription, as applied to real property, come under this head, and may be mentioned here. Both are governed by the *lex situs*, for the simple reason that the *situs* is necessarily the *forum*. A statutory limitation absolutely extinguishes a right of action, irrespective of its merits, and, in relation to land, has the indirect effect of creating a good title, by providing the possessor with a valid defence to any action which may be brought to interfere with his possession. It is thus plainly something pertaining to the remedy, and being a question of procedure must in principle, as will be shown again hereafter, be governed entirely by the *lex fori* (g). But it has been already stated that no action can be brought to interfere with the possession of realty except in the *forum* of the *situs*, so that the *lex fori* and the *lex situs* become identical. Similarly, *prescription* may be regarded as conferring a title generally to incorporeal rights in realty, directly, and not merely indirectly, by providing the possessor with a defence; and the rules of prescription are thus part of the law of property, of which the *lex situs* is the source. As, however, an incorporeal right in immovables can never be effectually asserted except in the courts of the *situs*, the *lex fori* and the *lex*

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Incidents of
immovables
—limitation
and pre-
scription.

(e) *Nelson v. Bridport* (1845), 5 Beav. 547, 570.

(f) *Batthyany v. Walford* (1886), 36 Ch. D. 269. In this case the English Court declared "that the estate of the testator is liable for the amounts, if any, for which, by the law of Austria, the said estate or the allodial heirs of the testator is or are liable in respect of the deterioration of" the land in question; and proceeded, "Let the plaintiff be at liberty to take such proceedings as he may be advised in the courts of Austria for the purpose of ascertaining the amount of any such liabilities."

(g) But as to this, see *Pitt v. Dacre* (1876), L. R. 3 Ch. D. 295; *infra*, p. 244.

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situs are again identical. Cases, however, may easily be conceived where a prescription or a limitation with regard to foreign immovables may be set up in an English Court in answer to an attempt to enforce in an English Court some such personal equity as that indicated by Lord Selborne in *Harrison v. Harrison* (1873), 8 Ch. 342, cited above. The question will then arise whether the *lex fori*, in matters of prescriptions and limitations which affect real estate, is the proper law to be followed, for its own sake, or only so long as it coincides with the *lex situs*? It seems clear on principle that if the rule of prescription appealed to is not merely and directly extinctive of the remedy sought, but is a law which affects directly to govern right and title in the immovable property concerned, then the *lex situs* is the proper law to govern as such. As to ordinary rules of limitation, which are not creative of title, except indirectly, the same reasoning hardly applies. Dana, the editor of Wheaton, says of these rules (*h*): "As these statutes are rules of repose resting on the policy of the State, it seems reasonable that any State may apply them to all suits in which the aid of its tribunals is invoked, whether the parties are citizens or aliens; whether the thing in dispute is within or without the territory of the State, and be movable or immovable, corporeal or incorporeal. It is true that a statute of limitations indirectly operates upon title to property, and has the same effect in aid of the party sued as a defensive prescription; and so it may be argued that they belong to the laws of property and not of mere remedy; but it is impossible, in international law, to be governed by these indirect operations."

In *Pitt v. Dacre* (1876), 3 Ch. D. 295, it was, however, apparently assumed by the Court that the law which regulates the prescription of actions as to real estate is not the *lex fori* but the *lex loci rei sitæ*. Funds had been paid into court representing the rents and profits of certain lands in Jamaica, out of which an annuity had been granted by will in 1810. The last payment on account of the annuity had been in 1842, and the personal representative of the annuitant claimed to be entitled to the funds in court to satisfy arrears of the annuity. It was held that the English Statute of Limitations did not apply to land in Jamaica, and that the claim of the personal representative of the annuitant was not barred by the lapse of time, although it was admitted that the *lex fori* regulated the prescription of actions which did not affect realty (*i*). Hall, V.-C., said: "There is no corresponding statute of limitations applicable to the island of Jamaica; and these annuitants are, in my judgment, as much

(*h*) Wheaton, Int. Law (1866), § 143, n.

(*i*) Citing *Ruckmaboye v. Mottichund* (1851), 8 Moo. P. C. 4.

entitled to recover their annuities as the estate itself, as they are only portions of the estate." No further notice of the conflict between the *lex fori* and the *lex situs* appears to have been taken. As to the question of the applicability of the *lex fori* to cases of prescription in personal actions, it will be discussed hereafter when treating of procedure; but it may here be mentioned that Westlake regards the *lex situs* as being applicable, while Story considers it conclusively settled in favour of the *lex fori* (k). The question of the applicability of local laws of prescription and limitation to real or immovable property appears to arise most naturally in this form. It is conceded that a valid title to land can only be conferred or taken away by the *lex loci rei sitæ* (l). It is equally indisputable that the manner and time of bringing an action, apart from any question of title to land, are regulated, like other matters of procedure, by the *lex fori* (*infra*, ch. x. (ii)). The title to land can of course be only directly litigated in the *forum situs*, but in administering and enforcing personal equities, it may often happen that it becomes necessary to inquire into the title to foreign land in an English Court (*supra*, p. 224). The question which will then arise is, whether the local law of prescription or limitation has either conferred or taken away any title to the foreign land, or whether it has merely enacted a rule to regulate the procedure of its own Courts, which will not be binding upon those of another country. In the large majority of cases, such laws do purport either to create a title positively, or negatively to take a title away by preventing its assertion. When the title is positively created by a law of prescription, it is tolerably clear that a foreign Court cannot be justified in ignoring it, though its own laws of prescription would not have conferred it under the same circumstances. The matter is not quite so clear when the local law of limitation merely enacts that, after a certain lapse of time, no action to assert title shall be brought. A law which prohibits the assertion of title does, however, practically take it away, and vest it in someone else. No person can be said to have a valid title to land by the *lex loci rei sitæ* which that law does not permit him to assert in its own courts. When a law takes away a remedy altogether, it virtually destroys the right to which such remedy is attached. To abolish a remedy is not to regulate it; and the right to regulate the remedy is all that the *lex fori* can reasonably claim. There may conceivably be cases where a law of limitation is so framed as to apply, and to be intended to apply, to procedure alone; but in the majority of instances this will not be so; and subject to this

Prescription
as to foreign
land—how
far governed
by the *lex
situs*.

(k) Westlake, Priv. Int. Law (1922), § 176; Story, §§ 576-581.

(l) *Ante*, p. 223.

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Liability of
foreign land
to debts of
owner.

exception, it is submitted that the provisions of the *lex loci rei sitæ* as to the period of limitation applicable to immovables should be universally followed.

With regard to the liability of foreign immovables to the debts of the owner, the *lex situs*, apart from any consideration of an equity affecting him, is alone entitled to be heard. In *Harrison v. Harrison* (1873), 8 Ch. 342 (m), on appeal from Romilly, M.R., where a Scotch heir had elected to take Scotch lands by descent in opposition to an English will, the domicile of the testator being English, and the will itself being ineffectual to pass real estate in Scotland, it was decided that the liability of the Scotch real estate to the payment of debts, as between the heir and the pecuniary legatees, must be determined by the law of Scotland, and not by the law of the country where the estate was being administered. In that case Lord Selborne said: "The doctrine of marshalling, as applied in favour of legatees against heirs-at-law taking descended real estates in England, is part of the *lex loci* of England affecting those real estates, and no question of conflict of law can arise under those circumstances. It is a wholly different thing when persons who have an interest in the personal estate only, endeavour indirectly to establish in their own favour, or for their own relief, a burthen upon real estate situate in another country, which, by the law of that country, would not be administered so as to give them what they ask. . . . It is admitted, as I understand, that the burthen of liability to debt, so far as relates to real estate, can only be created by the *lex loci rei sitæ*; but it is suggested that the burthen may be laid on real estate, on which it is not imposed by the *lex loci rei sitæ*, by an indirect equity in favour of the legatees. . . . What is that equity? There is no fiduciary relation. What right have these legatees, upon the footing of personal equity, to say that the heir shall not enjoy the Scotch real estate as the law of Scotland gives it to him, or that any burthen shall directly or indirectly be thrown upon that real estate in their favour, which would not be imposed by the law of Scotland?" Similarly it was decided in *Scott v. Nesbitt* (1808), 14 Ves. 438, that the question of a creditor's lien on real estate was to be determined by the *lex situs*. It may be added that a heritable Scotch bond in the possession of an English testator is real estate, and descends to his heir-at-law (n), being regarded as an integral part of the Scotch land which is bound by it to satisfy the debt. Nor does the fact that a personal obligation is inserted in such

Scotch heritable bonds.

(m) *Drummond v. Drummond* (1791), 6 Bro. P. C. 601; *Elliott v. Minto* (1821), 6 Madd. 16; *Carron Iron Co. v. Maclaren* (1852), 5 H. L. C. 416.

(n) *Johnstone v. Baker* (1808), 4 Madd. 474, n.; *Buccleuch v. Hoare* (1819), 4 Madd. 467; *Allen v. Anderson* (1846), 5 Hare, 163.

bonds alter their nature, the personal security being regarded as a mere adjunct to the heritable security (o). The case is different where the heritable bond is not an asset in the possession of the testator or intestate, but a bond given by him to someone else, and remaining after his death as a debt due from his estate, as well as a charge upon the Scotch land on which it was given. Thus, in *Maxwell v. Maxwell* (p), where an English testator charged his personal residuary estate with payment of "all his just debts," and after the date of his will borrowed £14,000 on Scotch lands, for which he gave a heritable bond, it was held that the expression "all my just debts" in the will, interpreted by the *lex domicilii* of the testator, included the charge on the Scotch land, and that the residuary personal estate was liable to payment of the £14,000 in exoneration of the Scotch realty. The Scotch heir, who took by intestacy (the will not affecting Scotch lands), was therefore not put to his election. It will be seen that this case, though from one point of view the converse of *Jerningham v. Herbert* (1829), 4 Russ. 388, depends in substance upon totally different principles. That case shows that a heritable bond in the possession of the testator, a charge on somebody else's Scotch land, is in reality regarded as a portion of that land, and is not included in a bequest of the testator's personal estate like other *choses in action*, although the debt which it secures is also due on a personal bond. *Maxwell v. Maxwell*, on the contrary, decided that where the testator had given such a heritable bond, charging his Scotch land, the debt secured by it was within the meaning of the phrase "all my just debts," as used in his will. The first case was decided on the ground that the *lex situs* must decide what is realty and what is not, and what is sufficient to pass it; the second on the ground that the *lex domicilii* must be called in to interpret a testator's intention.

It has just been said that the fact of a personal obligation being inserted in a Scotch heritable bond does not alter its nature, but that it descends notwithstanding to the heir-at-law. But if the personal obligation be contained in a separate instrument, so that the debt due to the testator was secured both by a Scotch heritable bond charging it on his debtor's land, and a personal security given by the debtor, the personal security may be disposed of by a will in the form of the domiciliary law, and the heir will thus lose the benefit of the Scotch heritable bond, as the debt secured by it may be paid to the executor or legatee under the

Scotch heritable bond—
effect of
collateral
security.

(o) *Jerningham v. Herbert* (1829), 4 Russ. 388.

(p) (1852), L. R. 4 H. L. 501; S. C. *sub voc. Maxwell v. Hyslop* (1867), L. R. 4 Eq. 407.

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will. This has been held not only where the personal bonds were specifically devised by the will (q), but also where the testator had devised generally to his executors "all his moneys, *securities for money*, chattels, and other personal estate" (r). The principles on which these decisions should be distinguished from those cases in which it has been held that a Scotch heritable bond is realty to which the Scotch heir is entitled, may perhaps be best stated in this way. Where a heritable bond alone is taken by the testator on lending his money, he is regarded as having in effect laid out that money in the purchase of Scotch land. But where he takes a personal bond as well, the debt due to him is regarded as still a *chose in action*, which still, therefore, forms part of his personal estate.

Cust v.
Goring.

The judgment in *Cust v. Goring*, delivered by Lord Romilly, forms a convenient summary of the previous cases on the subject, and may be quoted with advantage: "This is a case in which the determination of which system of law is to prevail depends less upon principle than upon authority. In order, therefore, to determine whether the Scotch or English law shall prevail in this case, it is necessary to consider the authorities affecting cases of this description, which I will do in their order. The first I think necessary to mention is *Brodie v. Barry* (2 Ves. & B. 36). It is very distinguishable from this case. There the testator had by his will purported to dispose of his Scotch real estate, but the will not being in conformity with the solemnities required by the Scotch law, was inoperative for this purpose. The question then was whether this raised a question of election against the Scotch heir, who was a legatee under the will. Sir W. Grant held that this was analogous to the case of a will purporting to dispose of copyholds not surrendered to the use of the will, and that therefore, as the will, in the case of copyholds, could be read against the customary heir, so also, in that case, the will could be read against the heir of the Scotch estates: the effect of which was, that he was put to his election. No contest arose between English and Scotch securities for the same debt. There was in that case no question but that the will did not affect the debt, or any instrument affecting to secure it.

"The next case is that of *Johnstone v. Baker* (4 Madd. 474, n.). That also was a case where the heritable bond was the only security given, which bond did not pass by the will of the testator, and which is, therefore, distinguishable from the present case.

"The *Duchess of Buccleuch v. Hoare* (4 Madd. 467), before

(q) *Buccleuch v. Hoare* (1819), 4 Madd. 467.

(r) *Cust v. Goring* (1854), 18 Beav. 383.

Sir John Leach, did raise a question between English and Scotch instruments given to secure the same debt. In that case the testator had advanced sums of money to the Duke of Buccleuch and the Duke of Montague, on two several occasions, which sums were secured by two Scotch heritable bonds and by two ordinary English money bonds. The testator, by his will, reciting that he was possessed of two bonds or obligations of the Dukes of Buccleuch and Montague, bequeathed them to his executors, upon certain trusts specified in the will. The Court held that the will passed the debt, and that the heir was a trustee for the legatee.

“In *Jerningham v. Herbert* (4 Russ. 388), before Sir John Leach, no contest arose between English and Scotch securities. That was the case of a Scotch heritable bond given to secure a debt, which, although it also contained a personal obligation to pay the debt, as a part of the same instrument, was held not to pass by a will which affected English property only. It does not therefore, as it appears to me, govern this question.

“*Allen v. Anderson* (5 Hare, 163), before Sir James Wigram, was the case of a testator who at the time of making his will was a creditor for a large sum of money, apparently not secured by any instrument whatever. Subsequently to the date of his will, a Scotch heritable bond was given to secure his debt, which bond was not affected by the will. The Court held, that the heir was not a trustee for the legatees under the will, and that he was not put to his election. That case also is very distinguishable from the present. It seems to me to have been analogous to the simple case of a testator laying out money in the purchase of land subsequently to the date of his will. The testator took a heritable bond as a security for the debt, which heritable bond did not pass by the will. If he had taken real estates in England, in exchange for the debt, it would not have passed by the will, and would in that case have been in all respects analogous to the case which actually occurred; and in the case last supposed it is obvious that, according to the principle of English law, the heir could not have been put to his election.

“In *Drummond v. Drummond* (Roberts on Personal Security, p. 209), before the House of Lords, and commented upon by Sir W. Grant in *Brodie v. Barry*, there was no contest between securities. The contest was, whether the English personal estates or the Scotch real estates, should be applied to discharge a heritable bond granted by the testator on his Scotch estates; and it was there held, that the Scotch law was to govern the question, inasmuch as the rights of a person to real property must depend upon the law of the country where it was situated; and consequently that the person who took the Scotch real estate must

take it with the burthen upon it, that estate being by the Scotch law the primary fund for the payment of the bond. . . . The only distinction between *Buccleuch v. Hoare* and the present case rests on this, that there the testator had by his will specifically bequeathed the English securities for the debt. In this case the testator has not specified the securities, but he has disposed of his personal property in general terms. The description, however, of the property bequeathed, contains the words 'securities for money,' which obviously includes the bond in question. But I think that this specific mention is not essential to the case. The English bond was the primary security for the debt; it was never cancelled; and it was not merged in or extinguished by the Scotch bond, which was given as an additional security" (s).

The proceeds of foreign lands, validly sold under a testamentary power of sale good by the *lex situs*, do not retain the character of immovable, and their disposition is governed by the *lex domicilii* of the testator (t).

In *Re Hewit; Lawson v. Duncan*, [1891] 1 Ch. 568, where a domiciled Scotch testator, after directing payment of his debts, testamentary and personal expenses, and giving various legacies and annuities, directed the residue to be apportioned amongst certain charities. The personal estate was sufficient to satisfy all his debts, &c., and the legacies and annuities; his residuary estate comprised English and Scotch realty. By Scots law annuities are a charge on heritable or real estate. Romér, J., held that the Scotch law of administration applied, and that the English realty, rateable with the Scotch realty, must contribute towards the annuities.

(iii) TRANSFER OF IMMOVABLE PROPERTY *Inter Vivos*.

Capacity for
transfer.

It is firmly established, that both as regards the capacity of transferring, and the necessary forms to effect the transfer, of land, the *lex situs* is alone competent to speak (u). With respect to formalities the rule has been recently recognised and followed, in a case where it was held that a conveyance not under seal, executed in England, of the right of shooting over Scotch lands, was governed by Scotch and not by English law (x). As regards the question of capacity, there is a dearth of English decisions, and some writers have shown an inclination to refer it, even with

(s) *Cust v. Goring* (1854), 18 Beav. 383.

(t) *In re Piercy; Whitwham v. Piercy*, [1895] 1 Ch. 83.

(u) Story, *Conflict of Laws*, §§ 430, 436 a; see the cases cited, *ibid.* 428, n. 3. Cf. the recent case *Re Hoyles; Row v. Jagg*, [1911] 1 Ch. 179 (C. A.), where it was held (Fletcher Moulton, L.J., doubting) that mortgages on land are deemed to be immovables and governed by the *lex situs*. (Applying *In re Fitzgerald; Surman v. Fitzgerald*, [1904] 1 Ch. 573.)

(x) *Adams v. Clutterbuck* (1883), 10 Q. B. D. 403.

respect to the transfer of realty, to the *lex domicilii* of the person, rather than to the *lex situs*. It has been pointed out in a previous chapter that English law as to the proper test for determining the capacity of a person, with reference to a particular act, is in an unsatisfactory state (*y*); but it can hardly be supposed that the fact of an Englishman being domiciled in Prussia, where majority is not attained until the age of twenty-five, would be sufficient to invalidate a conveyance by him of English land made when he was twenty-four. This is, however, a proposition for which numerous jurists, who advocate the claims of the domiciliary law, are prepared to contend (*z*); but the language of Abbott, C.J., in *Birtwhistle v. Vardill* (1826), 5 B. & C. 451, may be quoted to show how untenable it must be considered. "The rule as to the law of the domicile has never been extended to real property. . . . Is there any authority that the law of England, as to any lands in England, is to adopt the law of a foreign country?" (*a*).

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As to the formalities required to make a valid transfer, there is a greater abundance of decisions. Transfer *inter vivos* of real estate, by English law, must be governed as to the formalities which accompany it, by the *lex loci rei sitæ* alone (*b*). In *Robinson v. Bland* (1760), 2 Burr. 1079, Lord Mansfield said: "In every disposition or contract where the subject-matter relates locally to England, the law of England must govern, and must have been intended to govern. Thus . . . as to conveyances or wills of land, the *local nature of the thing requires them to be carried into execution according to the law here.*" *Waterhouse v. Stansfield* (1852), 10 Hare, 254, was a case where the effect of the law in Demerara was considered as to land there situate, purporting to restrain the alienation by a debtor of any immovable property without the assent of his creditors, express or implied, and without certain prescribed forms, intended to secure this object; and it was held that such a law must prevail to exclude the claim of an English assignee of the equitable interest in such land. Turner, V.-C., said: "When the law of a foreign country places a restraint upon the alienation of the property of a debtor situate in such country, an equity arising here on a contract entered into in respect of such property cannot be enforced against the *lex loci rei sitæ*."

Formalities
of transfer.

Restraints
on transfer.

(*y*) Chap. iii.

(*z*) See Story, Conflict of Laws, §§ 432 *seq.*, 51 *seq.*

(*a*) As to the capacity of aliens, see 33 & 34 Vict. c. 14, *ante*, p. 53.

(*b*) *Mercantile Investment and General Trust Co. v. River Plate Trust Loan and Agency Co.*, [1892] 2 Ch. 303; *Deschamps v. Miller*, [1908] 1 Ch. 856; *Warrender v. Warrender* (1835), 9 Bligh, 127.

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said, only conditional, depending upon the neglect or employment of the forms prescribed by the *lex situs*. It is to be observed, however, that all restraints imposed by that law, which determines generally the effect and operation of any attempt at the transfer of realty, are to be accepted as binding; and that such restraints only bind within the territorial limits of the authority which imposed them. Thus the English Statute of Mortmain does not apply to land within the colonies, which was decided in *Whicker v. Hume* (1858), 7 H. L. C. 124, upon the authority of Sir W. Grant in *Att.-Gen. v. Stewart* (1817), 2 Meriv. 143, though the case turned more upon the intention of the Legislature, and the policy of the law of mortmain generally, than upon the strictness of the theory of the intra-territorial operation of all laws regulating the disposition of immovables. Nor do they apply to land in Scotland; but where a will was made in England, and according to English form, by a domiciled Scotchman, bequeathing money to trustees to *purchase lands* (without saying where), and pay over the rents for charitable purposes to persons resident in Scotland, the bequest was held void under the Statute of Mortmain, there being nothing in the words to show that a purchase of anything but English lands was contemplated (e).

But in *Mayor of Canterbury v. Wyburn*, [1895] A. C. 89, it was held by the Judicial Committee that a colonial testator could effectually give money for the purpose of bringing English land under a charitable trust. In *Re Dawson*, [1915] 1 Ch. 626, however, the Court of Appeal held that a charge of charitable legacies on debentures in an Australian company, which possessed certain leasehold property in England, was invalid, on the ground that the leasehold interest under the English Mortmain Act could not be bequeathed for charitable purposes. The Australian law, which was the law of the testator's domicile, permitted a charge on land by will for charitable objects, but the letter of the law in the *lex situs* invalidated the whole bequest, because of the *scintilla* of real property interest.

In *Renaud v. Tourangeau* (1867), 2 P. C. 4, the effect of an attempt at restriction of all alienation for twenty years, by a Canadian testator, was discussed with reference to Canadian land; and though it was suggested in argument, by way of analogy, that such a restriction would be bad by English law, even if there had been a gift over, it was assumed throughout that the real question was, whether such a restraint on the alienation of Canadian land was bad or good by the law of Canada. It is true that Lord Romilly said in his judgment that it would be

(e) *Att.-Gen. v. Mill* (1827), 3 Russ. 328; *Curtis v. Hutton* (1808), 14 Ves. 537.

invalid, not only by the old French law, prevailing in Lower Canada, but by the general principles of jurisprudence; but it is plain that all that was meant by this latter expression was to signify those rules of public policy which must be taken as part of the Common Law in every part of the British Empire.

The income or annual proceeds of immovables are regarded as movables, either in the hands of trustees or of a beneficial owner, and may be validly disposed of without regard to the *lex situs* (f).

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(iv.) SUCCESSION TO IMMOVABLE PROPERTY BY WILL.

It is hardly necessary to state that the principle that conveyances *inter vivos* of realty must comply with the formalities required by the *lex situs*, applies *a fortiori* to all alienations of real property by will (g). And this rule applies to leaseholds or chattels real, which for this purpose are immovables. Thus a will executed according to the forms of the *lex domicilii*, but not attested according to English law, will not pass leaseholds in England (h). Conversely, a will executed according to the Wills Act, but not in accordance with the *lex domicilii*, will do so (i).

Formalities
of wills of
immovables.

The case of *Hood v. Barrington* (1868), 6 Eq. 218 (k), is referred to in a note in Jarman on Wills (l) as an authority for the proposition that a will of a testator domiciled abroad, not executed according to 1 Vict. c. 26, may enable the executor to sell leaseholds here, though it will not operate on the beneficial interest. This proposition appears questionable if taken generally, though undoubtedly true in the case cited. The decision in *Hood v. Barrington*, however, rested on the statutory effect of an English adoption (by sealing in the Probate Court) of a Scotch confirmation or probate; and it was held by Romilly, M.R., that the effect of the statute (21 & 22 Vict. c. 56, s. 12) was to give the Scotch executor all the powers of an English executor, including the power of selling leaseholds. It would be unsafe to infer from this decision that the executor of any foreign will, executed in

(f) *In re Fitzgerald*, [1903] 1 Ch. 933, 941; [1904] 1 Ch. 573, C. A.; *Scott v. Allnutt* (1831), 2 Dowl. & Cl. 404; *Noell v. Robinson* (1681), 2 Vent. 358.

(g) *Coppin v. Coppin* (1725), 2 P. Wms. 291; *Curtis v. Hutton* (1808), 14 Ves. 537; *Bovey v. Smith* (1682), 1 Vern. 85; *Drummond v. Drummond* (1791), 3 Bro. P. C. Toml. 601.

(h) *Pepin v. Bruyère*, [1900] 2 Ch. 504.

(i) *De Fogassieras v. Dupont* (1881), 11 L. R., n. 123. Cf. *Hood v. Barrington* (1868), L. R. 6 Eq. 218, in which it would appear that this point was not expressly taken. And see *Re Grassi*; *Stubberfield v. Grassi*, [1905] 1 Ch. 584, where a British subject had made his will out of the United Kingdom, not in the form of the Wills Act, but in conformity with the law of the place where it was made; it was under Lord Kingsdown's Act, s. 1, admitted to probate, and held effectual to pass his beneficial interest in leaseholds.

(k) As to the operation of Lord Kingsdown's Act (24 & 25 Vict. c. 114) upon the disposition of leaseholds by will, see *infra*, p. 324.

(l) Ed. 1910, vol. i. p. 6.

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affecting heir
or devisee.Foreign heir
—when put
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accordance with the domicile of the testator and admitted to probate in England, has a like power, if the formalities of English law as to wills of immovables have not been complied with.

But a will though not executed so as to pass real estate, may be read for the purpose of discovering in it an implied condition respecting real estate, annexed to a gift of personal property, and thus in *Brodie v. Barry* (1813), 2 Ves. & B. 127, a Scotch heir-at-law who was entitled to personal property under a will made in English form, was put to his election. Exactly the reverse case occurred in *Dundas v. Dundas* (1830), 2 Dow. & Cl. 349, where the heir-at-law of real estate in England, which the testator had attempted to devise by a will in Scotch form, imperfect to carry out the intention, was put to his approbate or reprobate of the will as it stood. Where the heir-at-law, in such a case, elects to take by inheritance in opposition to the will, it has been already shown that no personal equity attaches to him, by which the foreign realty can be affected by the law of the English Court as to marshalling in favour of the legatees (*m*), the mere fact that he is before the Court as a party to the suit not warranting any interference as to the foreign real estate, with the *lex loci rei sitæ*. Such an equity results, however, from the expressed intention of the testator, according to the interpretation of his will by the domiciliary law (*n*), and therefore though the English will of a domiciled Englishman may not be available to devise Scotch land, yet the heir to whom it would go on intestacy cannot share in other benefits under the will, if he defeat the intention of the testator as to the land by taking advantage of the invalidity of the will to pass it to the devisee. In such a case, therefore, he is put to his election; but the intention of the testator to pass the foreign land by his will must clearly appear, and it has been held that *general expressions* will not, as a rule, be sufficient to show that intention (*o*).

General words of intention will be intended to apply to such property only as would by its nature pass by the will, and to the uses therein expressed (*Johnson v. Telfourd*). Or, as Lord Cranworth expressed it in *Maxwell v. Maxwell* (1852), 2 G. M. & G. 707, the designation of the subject intended to be affected by the instrument in general words imports *primâ facie* that property only upon which the instrument is capable of operating. To affect foreign land indirectly by a will not executed according to the *lex situs*, by putting the heir to his election, the foreign property must be either specifically devised, as in *Brodie v.*

(*m*) *Harrison v. Harrison* (1873), L. R. 8 Ch. 342; *ante*, p. 246.

(*n*) *Maxwell v. Maxwell* (1852), L. R. 4 H. L. 501.

(*o*) *Johnson v. Telfourd* (1830), 1 Russ & My. 254; *Allen v. Anderson* (1846), 5 Hare, 163.

Barry (1813), 2 Ves. & B. 131, or there must be at any rate words from which the intention to act on it can be unequivocally gathered. These principles have been fully recognised in the later cases, an heir of foreign immovables being put to his election by a will not in itself operating upon them, only where there was a personal equity affecting him with reference to them, arising from the expressed intention of the testator or in any other manner. Thus, in *Dewar v. Maitland* (1866), 2 Eq. 834, a will devised lands in England to the testator's son and heir for life, remainder to trustees, and also lands in St. Kitts to the same trustees upon trust to sell and invest the proceeds in lands in England, to hold on the same trusts. The will was executed according to the English law only, and did not operate so as to pass the land in St. Kitts, but the heir-at-law having received the rents of the St. Kitts estates during his life, his infant heir was held bound by such election after his death, so as to be debarred from setting up his title as heir of the lands in question against the title of the trustees, who had contracted to sell the property to a stranger. So in *Orrell v. Orrell* (1871), 6 Ch. 302, where a testator devised "all the residue of my real estate situate in any part of the United Kingdom or elsewhere," having real estate in Scotland as well as England, the heir-at-law taking the Scotch lands was put to his election, it being held that the testator had sufficiently indicated his intention to dispose of his real estate in Scotland as far as he was able to do so; notwithstanding the general rule that without clear evidence of intention, a testator will be supposed only to be dealing with what he can dispose of by the instrument whose construction is in question. Except, however, so far as it is affected by such a personal equity as that involved in the doctrine of election, a will of foreign realty must comply strictly with the *lex loci rei sitæ*, and with that law alone; and it was decided in *Pike v. Hoare* (1736), 2 Ed. 182, that the English Court of Chancery would not direct an issue to try the validity of a will of lands in one of the colonies, which have distinct local laws of their own. And it has been decided that the provisions of 20 & 21 Vict. c. 77, which authorise the citing of the heir-at-law or persons interested in the real estate, when contentious proceedings arise as to the validity of a will, and by which the probate of a will granted after such litigation is to enure to the benefit of all persons interested in the real estate affected by the will, are not applicable to wills which in whole or in part have not been executed in accordance with the Wills Act (1 Vict. c. 26) (p). These statutory provisions cannot be employed, therefore, when the testator was not

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domiciled in England, and his will was executed so as only to satisfy the requirements of the law of his domicile, in order to bind indirectly immovable property in England by a will not executed in accordance with the *lex situs*. The construction, however, of wills is in all cases a matter for the law of the domicile alone, even when the destination of immovables situate in some country other than that of the domicile is affected by it (*q*). A will of immovables must contain no provision contrary to the limitations imposed by the *lex situs* on the disposition of immovables, as, for example, in the case of English law, to the perpetuity rule (*r*), the Accumulations Acts, 1799 and 1892 (*s*), and the Mortmain Acts (*t*).

Following the reasoning in *In re Almosnino* (1859), 29 L. J. (P.) 46, it was held in *In re Nichols*; *Hunter v. Nichols*, [1921] 2 Ch. 11, that where an Englishman domiciled in Chile had executed a closed will according to the provisions of the Chilean Civil Code, such will was capable of passing his real estate in England.

Will of immovables—meaning of the word “child” in devise.

A question not of construction, but of status.

It will be seen below, when the succession to movables under a will or intestacy is considered (*u*) that the legitimacy of a child depends for the purposes of such succession upon the law of its domicile at birth (*x*), that is, of the father's domicile at that time (*y*). The same rule was applied by Stirling, J., in *In re Grey's Trusts*, [1892] 3 Ch. 88, to a devise of foreign immovables by a testator domiciled in England, to the children of his son. The argument against such a construction of the word “child” is, of course, based upon the principle of *Birtchistle v. Vardill*, and the best collection of authorities which can be cited in support of it will be found in the (dissenting) judgment of Lush, L.J., in *Goodman's Trusts* (*z*), which is a storehouse of learning on the subject. On the other side, the language of James, L.J., in *Goodman's Trusts* (*supra*) speaks in no uncertain words.

(*q*) *Trotter v. Trotter* (1829), 4 Bligh. (N.S.) 502; S. C. 3 Wils. & S. 407; *Enohin v. Wylie* (1862), 10 H. L. C. 1. In the cases *Lushington v. Sewell* (1827), 1 Sim. 435, and *Stewart v. Garnett* (1830), 3 Sim. 398, the construction of a will of immovables was regarded as depending on the *lex situs*.

(*r*) *Re Grassi, Stubberfield v. Grassi*, [1905] 1 Ch. 584, per Buckley, J., at p. 592.

(*s*) *Ibid.*; cf. *In re Moses, Moses v. Valentine*, [1908] 2 Ch. 235; and *Freke v. Carbery* (1873), L. R. 16 Eq. 461.

(*t*) *Att.-Gen. v. Mill* (1827), 3 Russ. 328; (1831) 2 Dow. & Cl. 393, H. L.

(*u*) Chap. vii.

(*x*) *Re Goodman's Trusts* (1881), 17 Ch. D. 266; 50 L. J. Ch. 425 (overruling *Boyes v. Bedale* (1863), 1 H. & M. 798); *Andros v. Andros* (1883), 24 Ch. D. 637.

(*y*) In cases of legitimisation *per subsequens matrimonium*, the child must be legitimated by the law of the father's domicile, not only at the time of the birth, but at the time of the subsequent marriage: *Re Grove, Vaucher v. Solicitor to Treasury* (1887), 40 Ch. D., p. 216; *ante*, p. 117.

(*z*) In which Cotton and James, L.J.J., overruled (Lush, L.J., *dissentiente*) the judgment of Jessel, M.R.

“There is, of course, no doubt as to what the English law as to an English child is. . . . But the question is, What is the rule which the English law adopts and applies to a non-English child? This is a question of international comity and international law. According to that law as recognised, and that comity as practised in all other civilised communities, the status of a person, his legitimacy or illegitimacy, is to be determined everywhere by the law of the country of his origin—the law under which he was born. It appears to me that it would require a great force of argument derived from legal principles, or great weight of authority, clear and distinct, to justify us in holding that our comity stands in this respect aloof in barbarous insularity from the rest of the civilised world.”

It must be remembered, in considering this question, that until this decision of the Court of Appeal in *Goodman's Trusts*, the principle of applying the law of the domicile of the successor to decide his legitimacy was not recognised at all, even with respect to movables; and Story's statement of the English law on this point must be read as the expression only of the earlier English cases on the subject (a). It is now, however, clear that both with regard to testacy and intestacy, the legitimacy of the successor to movables depends upon his personal law. It is submitted that there is no reason why the same test should not be applied in the case of a *devise* of English land. There may at first sight appear something inconsistent in applying the *lex situs* to a case of inheriting land as heir, and the *lex domicilii* when the question is of the legitimacy of a devisee, but the cases are really different in principle. In the case of heirship, the question is what sort of heir the *lex situs* demands. In the case of a devise “to the children of A,” the question is what sort of children the testator intended. “*Heirship* is an incident of land, depending on local law, the law of the country, the county, the manor, and even of the particular property itself, the *forma doni*. *Kinship* is an incident of the person, and universal” (b). Legitimacy is an incident of kinship, and was, in fact, the very incident of kinship of which James, L.J., was speaking in the words quoted.

So far as the English Courts are concerned, it has been already pointed out that both for devises of realty, and bequests of personalty, the law of the domicile of the legatees is now preferred (c). The view taken may be put shortly thus. “Child”

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of devisee—
may perhaps
be referred
to *lex*
domicilii.

(a) Story, Conf. § 479 h.; *Enohin v. Wylie* (1862), 10 H. L. Cas. 1; *Boyes v. Bedale* (1863), 1 H. & M. 798.

(b) From judgment of James, L.J., in *Goodman's Trusts*, *supra*.

(c) *In re Grey's Trusts*, [1892] 3 Ch. 88; *Andros v. Andros* (1883), 24 Ch. D. 637.

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or "son" in an English will means, of course, "legitimate child" or "legitimate son." But the legitimacy of a man's children is a question of status, not of the construction of a will; and the legitimacy of a child is determined by the law of the domicile of his father. A devise of English land "to the heir of A" would, of course, be a very different thing; and could hardly be construed otherwise than as a devise to that person, who was regarded as the heir by the law of the *situs*. The rule that the formalities of a will of immovables, including chattels real (*d*), must be decided by the *lex situs*, does not appear to affect the question.

Hitherto the transfer of immovable property in accordance with the wish of its owner, expressed either in a conveyance *inter vivos*, or by a testamentary disposition, has been spoken of. Land, however, changes owners under certain circumstances without any expressed intention on the part of the owner, by the mere operation of law. It will be necessary to consider what law operates, and how far it excludes all others, in the alienation of land either (v.) by succession on intestacy, or (vi.) by assignment on bankruptcy, or (vii.) by operation of marriage.

(v.) SUCCESSION TO IMMOVABLE PROPERTY ON INTESTACY.

Inheritance
of immov-
ables.

It has already been stated, in treating of the question of legitimacy, that the English law requires an heir to English land to be legitimate by the law of the *situs* as well as by that of his domicile (*e*). Not only is this question to be decided by the former law, but the destination of the property is determined in all other respects by it (*f*). The question in *Birtwhistle v. Vardill*, before which decision the law on this point can hardly be regarded as settled, was whether a child born in Scotland, of parents domiciled there, before their marriage, being admittedly legitimate by the law of Scotland, was legitimate for the purpose of taking English lands by inheritance; and after two arguments before the House of Lords, it was solemnly decided that he was not, since an heir must be, in Lord Coke's words, "*ex justis nuptiis procreatus; nam heres legitimus est quem nuptiæ demonstrant.*" It has been already pointed out that this decision was

Legitimacy
of inheritors.

(*d*) *Re Nicholls; Hunter v. Nicholls*, [1921] 2 Ch. 112; *Pepin v. Bruyère*, [1900] 2 Ch. 504; [1902] 1 Ch. 24; *De Fogassieras v. Duport* (1881), 11 L. R. Tr. 123.

(*e*) *Doe d. Birtwhistle v. Vardill* (1826), 7 Cl. & F. 895; and see *supra*, p. 116. On the question whether this special legitimacy is required for succession to chattels real, see note to this chapter, pp. 271 *seq.*

(*f*) *Balfour v. Scott* (1793), 6 Bro. Parl. Cas. 550; *Drummond v. Drummond* (1791), 6 Bro. Parl. Cas. 601; *Doe d. Birtwhistle v. Vardill* (1826), 5 B. & C. 438; (1835) 2 Cl. & Fin. 581, H. L.; (1840), 7 Cl. & Fin. 895, H. L.; *Dalhousie v. McDouall* (1840), 7 Cl. & Fin. 817, H. L.

arrived at in opposition to the opinion of Lord Brougham, and that it is in conflict with the view taken on the question of legitimacy by the jurists of almost all other nations; but the general rule, that the succession to real estate is governed in all respects by the *lex loci rei sitæ*, is established by it for all practical purposes. In the words of Wheaton (Elements of International Law, § 80), the “law of the place where real property is situate governs exclusively as to the tenure, the title, and the descent of such property,” while the English law alone, when it speaks as the *lex situs*, demands that the heir should be legitimate by the law of his domicile as well. And on the same principle it was decided in *Re Don's Estate*, (1857), 27 L. J. Ch. 98, that, although a son legitimised *per subsequens matrimonium* by the law of his domicile has the personal status of legitimacy, yet upon his death without issue his father cannot inherit English land from him (under 3 & 4 Will. 4, c. 106).

The law of the *situs* similarly decides the nature of the succession to immovable property, and its incidents. Thus a heritable Scotch bond in the possession of an English testator is real estate, and in the absence of a will effectual to pass Scotch realty, descends to his heir-at-law (*g*). And where a Scotch heir elected to take Scotch realty by descent in opposition to an English will, it was held by Lord Selborne in *Harrison v. Harrison* (1873), 8 Ch. 342, that the doctrine of marshalling did not apply, and that the incidents of the succession to the Scotch realty was governed by the *lex loci rei sitæ* alone. In the case last cited, Lord Selborne says, “In our judgment all questions as to the burdens and liabilities of real estate situate in a foreign country in the absence of any trust or personal contract (which might make a difference), depend simply upon the law of the country where the real estate exists.” So where the heir of a Scotch estate filed a bill in England to have his estate exonerated from a heritable bond by the application of personal estate in England, Sir J. Leach, in *Elliott v. Minto* (1821), 6 Madd. 16, held that the question whether he had an equity to be exonerated was to be determined by the *lex loci rei sitæ*, and not by the law of the country where the personal estate happened locally to be. Almost exactly the same question had previously arisen in *Drummond v. Drummond* (*h*); but it appeared there that the intestate had been domiciled in England at the time of his death, which was not stated to have been the case in *Elliott v. Minto*. The decision there also was in favour of the *lex loci rei sitæ*. In

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Immovables.Equities
affecting
heir.

(*g*) *Buckleuch v. Hoare* (1819), 4 Madd. 467; *Johnstone v. Baker* (1808), 4 Madd. 474 n.; *Jerningham v. Herbert* (1829), 4 Russ. 388.

(*h*) Cited in *Brodie v. Barry* (1813), 2 Ves. & B. 131.

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Foreign land
not burdened
except by the
lex situs.

another case, cited by Sir W. Grant at the same time as *Drummond v. Drummond*, the Scotch heir was also one of the next of kin, and claimed his share in the personalty of the intestate, who had died domiciled in England. By the Scotch law, he was not entitled to do so except on condition of collating or bringing into hotchpot the real estate, so as to form one common subject of division; but it was held that the English law was to be followed, and that he was entitled to share in the personalty without fulfilling this condition (i). The real analogy between this case and that of *Drummond v. Drummond* is perhaps not very close, but it appears correct enough to say that the conditions on which a man is to share in personalty must be prescribed by the law of the intestate's domicile alone (k). In *Drummond v. Drummond* the question was not as to the conditions under which the next of kin, who happened to be also the heir to the Scotch estate, was to take the English personalty (as in *Balfour v. Scott*); but as to the right of the heir to the Scotch estate, in that character, to have his estate exonerated from debts to which it alone was liable by Scotch law. Upon the general principle expressed in the *dictum* of Lord Selborne in *Harrison v. Harrison*, that all questions as to the burdens and liabilities of real estate situate in a foreign country are to be referred to the law of the country where the real estate is situate, there can be no doubt that the decisions in *Elliott v. Minto* and *Drummond v. Drummond* were right. The latter case was indeed cited with approval by Lord Hatherley in *Maxwell v. Maxwell* (1852), 4 H. L. 501, where a domiciled Englishman, by a testamentary disposition in the Scotch form, gave certain real estate in Scotland, and by a subsequent will in the English form, after declaring that the trusts of his present will should not affect the Scotch estate, nor put to his election any person who should claim under both instruments, gave the residue of his estate upon trusts for sale and payment of "all his just debts" and legacies. He subsequently charged the Scotch estate with a debt of £14,000, by means of a Scotch heritable bond, and purchased other real estate in Scotland, which passed by intestacy to his heir. It was held, first, that the residuary estate was liable to payment of the £14,000 in exoneration of the Scotch estate—thus adopting the interpretation of the *lex domicilii* as to the expression "all my just debts"—and secondly, that the Scotch heir, who took something under the will, was not bound to elect, but had the same right to the real property that he would have

(i) *Balfour v. Scott* (1793), 6 Bro. P. C. 550; 5 Ves. 750; S. C. in *Brodie v. Barry* (1813), 2 Ves. & B. 131.

(k) *Infra*, chap. vii. (iii.).

had if there had been no will. "We have not here," said Lord Hatherley, "a case like that of *Drummond v. Drummond*, in which, there being a charge of land in Scotland which was the debt of the intestate, and there being also personal property of the intestate, the property of the intestate was administered according to English law, England being the country of his domicile. There the Court held that the person himself—the *præpositus*—had expressed no intention, but had left his property to be disposed of as the law might direct, as affecting his two classes of property. The law would apply his Scotch estate according to the existing law in Scotland. That would involve the necessity of the Scotch creditors taking his remedy out of the Scotch estate, and the necessity, therefore, of the heir to the Scotch estate bearing that burden; and the consequence would be that the person entitled to the personal estate in England would not be liable to bear that charge, which would primarily be a charge upon the Scotch estate. But here we are dealing with a *testator's intention, as expressed in his will*." And Lord Westbury says, in the same spirit (l), "*Drummond v. Drummond* had nothing to do with this case. *Drummond v. Drummond* was nothing more than an illustration of the settled principle, that real estate is governed by the *lex loci*. The Scotch owner of the estate in that case took it, according to the law of Scotland, *cum onere*." The other point, with regard to the want of any obligation of the Scotch heir to make election, and bring his land into hotchpot in order to take under the will, was similarly decided with reference to the intention of the testator. An heir to foreign realty may take it unconditionally according to the law of the *situs*, and nevertheless share under an English will which was ineffectual to devise it, *unless it appear distinctly from the terms of the will that the testator intended that he should not be allowed to do so* (m). In *Balfour v. Scott* (1793), 2 Ves. & B. 131, n., there was an intestacy, so that no such intention could be suggested, and the Scotch heir accordingly took the Scotch land according to Scotch law, and a share of the personalty, as next of kin, according to English law. So in *Johnson v. Telfourd* (n), it was held that an heir of Scotch real estate was not put to his election by *general expressions*, unless it was clearly to be collected from the words used that the testator meant to pass his Scotch estate to the uses of the will. "Where the testator uses only general words," said Sir John

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—when put
to his
election.

(l) At p. 519. See as to the exoneration by personalty of real estate: *Mellish v. Valins*, 2 J. & H. 194; *Eno v. Tatham* (1863), 3 De G. J. & S. 443; and 17 & 18 Vict. c. 113 (Locke King's Act).

(m) *Harrison v. Harrison* (1873), L. R. 8 Ch. 342; *ante*, p. 254.

(n) (1830), 1 Russ. & My. 254; and see *Allen v. Anderson* (1846), 5 Hare 163.

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Immovables.*Intention of
testator—
foreign heir
bound by.

Leach, "it is to be intended that he means those general words to be applied to such property as would by its nature pass by his will, and to the uses therein expressed." And this doctrine was expressed in *Maxwell v. Maxwell* (o), where the will purported to devise to trustees all the testator's real and personal estate wheresoever and whatsoever. It was invalid as to certain Scotch heritable bonds—real property by the Scotch law—and it was held that the Scotch heir was not bound to make election. Lord Cranworth said: "The designation of the subject intended to be affected by the instrument in general words imports *prima facie* that property only upon which the instrument is capable of operating." If the will had specifically devised the heritable bonds in question, the question would of course have been manifest, and the Scotch heir could not have taken them in opposition to the will at the same time that he received a benefit under it. This was actually the ground of the decision in *Brodie v. Barry* (1813), 2 Ves. & B. 131, where the will expressly devised the testator's real estate in Scotland, although it was ineffectual to do so, and the Scotch heir was of course put to his election.

In cases of intestacy, it is apparent that these considerations of the intention of the deceased owner cannot arise, and the proper laws will therefore be left to operate upon immovable and movable property respectively. The burdens of the former, as also its claims to exoneration (p), will therefore be decided by the *lex situs*; the distribution of the latter, and the conditions under which those entitled may share in it (though they may also be the heirs of foreign immovables), by the *lex domicilii* of the intestate (q). It is hardly necessary to say that when the foreign heir elects to take in opposition to a will purporting to deal with his inheritance, there is, *quoad* the foreign land, an intestacy, though the will remain by the law of the testator's domicile as to the movable personalty (r).

It was held, in *In re Piercy*, [1895] 1 Ch. 83, that the *proceeds* of foreign lands, sold under a testamentary trust for sale admittedly good by the *lex situs*, were effectively disposed of by the will under the law of the testator's domicile, though not in accordance with the *lex situs* of the land. The ground of the decision was that the proceeds of the sale of land in a foreign country were to be regarded as money, or movable personalty, pure and simple.

(o) (1852), 2 De G. M. & G. 705. This case is cited with approval by Malins, V.-C., in *Maxwell v. Hyslop* (1867), L. R. 4 Eq. 415.

(p) *Elliott v. Minto* (1821), 6 Madd. 16; *Drummond v. Drummond* (1791), 2 Ves. & B. 131.

(q) *Balfour v. Scott* (1793), 2 Ves. & B. 131; S. C. Bro. P. C. 550.

(r) *Harrison v. Harrison* (1873), 8 Ch. 342. As to succession to chattels real, see the note at the end of this chapter, p. 271.

And in *Re Lyne's Settlement Trusts*, [1919] 1 Ch. 80, where part of a marriage settlement trust funds was invested in land in England and held upon trust for sale, and where the testatrix had disposed of her interest by a holograph unattested French will, which had been admitted to probate under Lord Kingsdowne's Act, it was held by the Court of Appeal, reversing Peterson, J., that the interest of the testatrix in the trust funds represented by the freeholds was personal estate within the meaning of Lord Kingsdowne's Act, and was effectually disposed of by the French will.

But this case did not raise the question whether, being personal estate, it was or was not a movable or an immovable. Cozens-Hardy, M.R., in *In re Hoyles*, [1911] 1 Ch. 179, cited with approval Dicey's proposition, "immovable property includes all rights over things which cannot be moved, whatever be the nature of such rights or interests" (Conflict of Laws (2nd ed.), p. 76). In § 158 of the 4th and 5th editions of Westlake's Private International Law occurs the following proposition: "Money substituted for an immovable by the *lex situs* is subject to the same rights as the immovable, but where an immovable is sold under a disposition made by the owner or in consequence of a dealing with it by the owner, the rights to which it was subject as an immovable do not affect its proceeds unless kept alive against them by the will of the parties or by the *lex situs*."

In *Murray v. Champernowne*, [1901] 2 I. R. 232, real estate in Ireland was vested in trustees upon trust for sale. The trusts of the proceeds of sale, in the events which happened, were for such persons as Alexander Murray, a domiciled Scotsman should by deed or will appoint. He died in 1865, having by a will made in 1862 given the residue to his wife, Eugenia, for life, and appointed her his residuary legatee. It was held that the effect of his will was to vest in Eugenia absolutely all the property over which Alexander had power of appointment. Probate of the will in common form was granted in 1866 to the executor named therein. It subsequently transpired that the will, though duly executed in accordance with the Wills Act, was invalid according to the law of Scotland. Eugenia died in 1897, having by her will (which had been proved in England and resealed in Ireland) given the residue of her property real and personal to Philip Murray, whom she appointed her executor. The action was brought to obtain revocation of the probate granted in 1866. The real estate in Ireland, which was subject to the trust for sale under the settlement was in fact still unsold. The probate was revoked, but the question arose whether, since

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the will was duly executed in accordance with the Wills Act, there should not be a decree for a limited grant; in other words, whether the will being valid according to the law of Ireland (where the lands were situate) was not operative as an execution of Alexander's general power of appointment over the proceeds of sale of the land. For this purpose it was necessary to determine whether the property subject to the power was immovable property or not. It was argued that the lands were equitably converted into money and that the property subject to the power was therefore movable property which the will was invalid to pass. It was held by Andrews, J., that the real estate subject to the power, notwithstanding the trust for conversion, was to be regarded as land, *i.e.*, as immovable, and he gave Philip liberty to apply for a grant to him of letters of administration with the will annexed, limited to such estate or the proceeds thereof as Alexander had power to appoint, in so far as he had appointed and in so far as the same so appointed passed under the will of Eugenia.

In the opinion of the learned Judge the lands in question, notwithstanding the doctrine of equitable conversion, were still lands in fact and might never be sold under the trusts. "It is," he said, "still immovable property in fact and the disposition of it is a disposition of immovable property and not of something else, namely, the money by which, if sold, it would be represented, but which before the sale does not in fact exist."

This case is relied upon by Dicey and Keith for their proposition in their edition of 1922, at p. 547, namely: "The devolution of immovables situate in a foreign country, *i.e.*, foreign land or of money representing such immovables is determined, so far as the matter can be dealt with by English Courts, in accordance with the *lex situs*." Mr. Bentwich, however, is doubtful whether the decision in *Murray v. Champernowne* is consistent with that in *Re Lyne's Settlement Trusts*. He thinks the decision that land on trust for sale passes as land is of doubtful validity, but that the will might have been held good under Lord Kingsdown's Act and therefore effective to pass the property supposing it was deemed to be personalty. With this doubt Russell, J., disagreed in *In re Berchtold*, [1923] 1 Ch. 192, where he held that when a person domiciled abroad dies intestate, leaving an interest in the proceeds of sale of English freeholds, which are subject to a trust for sale, but not yet sold, such an interest is an immovable and the succession thereto is governed by the *lex situs*. Quite apart from the decision in *Murray v. Champernowne*, of which he approved, Russell, J., came to the conclusion that the rights and interests of the parties entitled under the will in relation to

the freeholds and the proceeds of sale thereof should be classified as immovable property equally with the freeholds out of which the money is eventually to be paid. (See *In re Miller*, [1914] 1 Ch. 511.)

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—Bank-
ruptcy.

(vi.) ASSIGNMENT OF IMMOVABLES BY BANKRUPTCY.

It is said by Wheaton that the question how far a bankruptcy declared under the laws of one country will affect the real and personal property of the bankrupt situate in another State, "is a question of which the usage of nations, and the opinions of civilians, furnish no satisfactory solution. Even as between co-ordinate States belonging to the same common empire it has been doubted how far the assignment under the bankruptcy laws of one country will operate a transfer of property in another. In respect to real property, which generally has some indelible characteristics impressed upon it by the local law, these difficulties are enhanced in those cases where the *lex loci rei sitæ* requires some formal act to be done by the bankrupt, or his attorney specially constituted, in the place where the property lies, in order to consummate the transfer" (s). The difficulty, as it now presents itself to English Courts, is rather to construe properly the provisions of the statutes relating to bankruptcy in force for the time being, so as to understand what property they affect to convey to the trustee or assignee of the bankrupt. The old Bankruptcy Act of 1849 was limited in terms (s. 142) to real estate in "England, Scotland, or Ireland, or any of the dominions, plantations, or colonies belonging to her Majesty." The Act of 1869 contained no such express limitation, nor, on the other hand, anything expressly extending to foreign land. By s. 53 of the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), on the appointment of a trustee, the property of the bankrupt passes to and vests in the trustee; and by s. 167 property includes "money, goods, things in action, land and every description of property, whether real or personal, and whether situate in England or elsewhere." So far, therefore, as the control of the English Court can reach, and with reference to the rights and equities of persons before it, it will consider that foreign land belonging to the bankrupt is to be treated as passing to the trustee; and it would seem that, under the compulsory powers given by s. 22, the bankrupt may be ordered to execute a valid conveyance of foreign land to the trustee, according to the requirements of the *lex situs*. But it is clear that the Bank-

Assignment
of immov-
ables on
bankruptcy
—how far
extra-
territorial.

English
statutes.
Obligation
to convey
foreign land.

(s) Int. Law (1904), p. 222-223. See as to the persons over whom English bankruptcy law intends to assume jurisdiction, the cases of *Cooke v. C. A. Vogeler & Co.*, [1901] A. C. 102; *Ex parte Blain* (1879), 12 Ch. D. 522; *Ex parte Pearson*, [1892] 2 Q. B. 263. See *infra*, chap. vii., sec. iv.

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ruptcy Act in itself cannot operate to pass the title to foreign land; and even with respect to colonial land, it only operates to pass such land according to the law of the colony (t). That is to say, the title will pass if, and not unless, the law of the colony in question recognises the effect of the English bankruptcy law as transferring the title to colonial land. This is of course a question quite distinct from the recognition in the colonies of the validity of a discharge granted under an imperial bankruptcy statute (u).

With regard to the suggested power under s. 22 of compelling a bankrupt to execute a conveyance of foreign land, it had been held under the Act of 1849 that a bankrupt under an English commission of bankruptcy could not be compelled to assign his foreign real estate to his assignees, though it was suggested that he might be indirectly obliged to do so by withholding his certificate. The reasoning, however, of Lord Selborne in *Harrison v. Harrison* (x), already quoted on a different point, seems directly applicable. Unless there is a personal equity affecting the owner of real estate situate abroad, an English Court cannot claim to control such estate by acting on him, and it is quite clear that no English Court would recognise such a claim, as to English land, by the trustees or assignees under a foreign bankruptcy. In a later case (y), Parke, B., after saying that, generally speaking, real estate is governed by the *lex loci rei sitæ*, and not transferred by an assignment according to the law of the domicile of the owner, proceeded, "We have the authority of Lord Eldon in *Selkirk v. Davis*, in the analogous case of an English commission of bankruptcy, that a bankrupt cannot be compelled directly to assign his real estate to his assignees; and though there are indirect methods, as withholding their certificate, or by creditors assigning their debts to others in order to obtain execution against the real estates, neither of these are in the power of the assignees as such, *nor would the first of them seem to be in any case properly applied.*" It appears clear, however, that under the Bankruptcy Act, 1914, the express inclusion of land, "whether situate in England or elsewhere" (s. 167), coupled with the language of s. 53, does impose such a personal duty on the bankrupt. That section provides that the bankrupt "shall . . . execute such powers of attorney, conveyances, deeds, and instruments, and generally do all such acts and things in relation to his property and the distribution of the

(t) *Ex parte Rogers, Re Boustead* (1881), 16 Ch. D. 665.

(u) See *Ellis v. McHenry* (1871), L. R. 6 C. P. 228, and *infra*, chap. viii.

(x) (1873), 8 Ch. 342; see p. 260, *supra*.

(y) *Cockerell v. Dickens* (1840), 3 Moo. P. C. 98, 133; see also *Ex parte Blakes* (1787), 1 Cox, 398.

proceeds amongst his creditors, as may be reasonably required . . . or prescribed . . . or directed.” It has already been pointed out that by the joint operation of ss. 167, 53, foreign land is included in the definition of property “divisible amongst his creditors”; and it is therefore submitted that the personal equity or duty attaches on the bankrupt, and will be enforced in a proper case.

By s. 97 of the Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. 5, c. 20), the whole heritable estate in Scotland and all real estate situate in England, Ireland, or in any of His Majesty’s dominions, belonging to the bankrupt, and all interest in or regarding such real estate which the bankrupt held or to which he was entitled, vests in the trustee absolutely and irredeemably, as at the date of the sequestration. By the Irish Bankruptcy Act, 1857, however, all a bankrupt’s estate, wherever situate, is vested in his assignees; a provision which was not repealed by the Irish Bankruptcy Act, 1872 (35 & 36 Vict. c. 58).

By s. 7 of the Indian Insolvent Debtors Act, 1848 (11 & 12 Vict. c. 21), upon the filing of a petition the Court may order all the real and personal estate whether within or without the territories of the East India Company to vest in the official assignee.

With regard to the effect attributed in England to a foreign bankruptcy, so far as land is concerned, it is clear that no foreign bankruptcy law will pass land in England to a trustee or assignee. It matters not for this purpose whether the bankruptcy be under the law of a purely foreign State, or of a colony or other dependency of the British Crown (z). The proper course in such a case is to take proceedings in the foreign Court, where the bankruptcy is pending, to compel the bankrupt to transfer the English land to his trustee or assignee (a). So far as English, Scotch, Irish, and other “British” Courts are concerned, it is provided by s. 121 of the Act of 1914 that “they shall severally act in aid of and be auxiliary to each other; and an order of the Court seeking aid, with a request to another of the said Courts, shall be deemed sufficient to enable the latter Court to exercise, in regard to the matters directed by the order, such jurisdiction as either the Court which made the request or the Court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions.” Under the similar s. 118 of the Act of 1883, an order was made in England in aid of the Cape of Good Hope Court of Bankruptcy (b). The jurisdiction, however, was not resisted;

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(z) *Re Levy's Trusts* (1885), 30 Ch. D. 119, 123.

(a) *Waite v. Bingley* (1882), 21 Ch. D. 674, 682.

(b) *In re Firbank, Ex parte Knight*, 4 Morell, 50.

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but it appears open to grave doubt whether a Cape of Good Hope Court is "British" within the meaning of this section. If so, it must be also British for the converse of the case then before the Court, which implies that Parliament intended, by the Act, 1883, to confer jurisdiction upon Courts in colonies like the Cape of Good Hope to hear and grant applications in aid of English bankruptcies, and to direct the officers of such colonial Courts to act in aid of English trustees and receivers. It is not probable that a Court of a colonial Legislature would consider itself bound by the English statute, if such a case was brought before it; and the more natural interpretation of s. 121 of the Bankruptcy Act, 1914, appears to be that it is intended for Scotch, Irish, and English Courts, and also for such other British Courts as are not under Legislatures of their own—*e.g.* the local Courts in the Isle of Man or the Channel Islands.

(vii.) ALIENATION OF IMMOVABLE PROPERTY ON MARRIAGE.

The late learned author held with Westlake (c) and Story (d) that the nature of the rights acquired by the husband and wife respectively at marriage in the immovables of the other is decided absolutely according to English law by the *lex situs*. In view of the fact that the decision of Kekewich, J., in *De Nicols v. Curlier*, [1900] 2 Ch. 410, is still unchallenged, Mr. Norman Bentwich, the present editor of Westlake, has withdrawn this proposition and substituted the following, viz.: "The law of the matrimonial domicile regulates the rights of the husband and wife to immovable property, whether in England or abroad, belonging to either of them, at least where that law by its rules of private international law holds the matrimonial system of property to be indivisible," or where there is an express contract to that effect (e). In the same case it had been held that the widow was entitled to her share of the personal chattels as of a community, and that a change of domicile after the matrimonial domicile had been once established, or a post-nuptial change of nationality, will not change the matrimonial system of property (see [1900] A. C. 21). When the case came on again before Kekewich, J., for a determination as to the English freeholds and leaseholds, the learned Judge held that the provisions of the French Code as regards *immeubles* are of universal application, and apply equally to immovable property situate in France and to that situate in a foreign country, and that there being a special marriage contract defined by reference to the French

(c) Priv. Int. Law (1912), pp. 74 *et seq.*

(d) Conflict of Laws, § 449.

(e) Priv. Int. Law (1922), §§ 35, 167.

Code, it had the same binding effect as an express contract, and was enforceable against the real and leasehold property in this country, subject to the questions whether the Statute of Frauds required the contract to be in writing under the hand of the creator of the trust, and that the Statute of Frauds did not apply, since this was in substance a contract of partnership, and the premises necessary for the purposes of that partnership would by operation of law be held for the purposes of that partnership. It had been established here by evidence that land acquired by either of the parties to the contract would by force of the contract be held by him or her on certain terms described briefly by the phrase "community of goods." Consequently the real and leasehold property were as much subject to the community of goods as the movables, which had been held subject to it by the decision of the House of Lords.

This decision is in consonance with Dumoulin's doctrine as expressed by Mr. Bentwich above; with rule 2 in the Hague Convention, 1905; and with the language of Lord Meadowbank in *Royal Bank of Scotland v. Cuthbert* (1813), 1 Rose, 481, viz. : "When a lady of fortune having a great deal of money in Scotland, or Stock in the banks or public companies there, marries in London, the whole property is *ipso jure* her husband's. It is assigned to him. *The legal assignment of a marriage operates without regard to territory all the world over.*" In *Selkirk v. Davis* (1814), 2 Rose, 97, however, Lord Eldon limited the doctrine laid down in the latter case to personal property. In the Married Women's Property (Scotland) Act, 1881 (44 & 45 Vict. c. 21), the principle of the matrimonial domicile is accepted as to the personal estate of the wife and the rents and profits of heritable property in Scotland belonging to her, and the power of settlement by ante-nuptial contract of marriage is expressly preserved. And by s. 7 of the Married Women's Property (Scotland) Act, 1920 (10 & 11 Geo. 5, c. 64), if the husband domiciled in Scotland becomes domiciled furth of Scotland, s. 1 of the Act applies to the heritable property of the wife, which by the section becomes her separate estate.

In *Harris's Trustees*, [1919] S. C. 432, the testator was a domiciled Englishman, who left a will by which his whole estate and effects, heritable and movable, were conveyed to trustees, but certain land in Scotland was excepted from the operation of the clause conferring powers of sale. The trustees having obtained an order from the High Court of Justice in England declaring a sale expedient, and authorising them to apply to the Court of Session for power to sell the land in Scotland, the Court of Session, following the course adopted in *Allan's Trustees*

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(1897), 24 R. 718, and *Pender's Trustees*, [1907] S. C. 207, in the exercise of its *nobile officium*, authorised the sale in order to explicate the jurisdiction of the English Court over the trust, by enabling the declaration of the English Court to be carried into effect. "An English testator is presumed," said Lord Salvesen, "by a necessary legal fiction to know the law of the country to which he belongs. He must, therefore, be taken to know that it is within the powers of an English Court, notwithstanding a direction by him to the contrary, to authorise the sale of landed property belonging to him in England. He cannot be supposed to know that a different rule applies in Scotland, and that in the present state of our law we are bound to give effect to an express direction by a Scottish testator that his landed property in Scotland should not be sold. Even in Scotland such a direction is of no value where it has become necessary to sell the landed property in order to meet debts, but an English testator must be taken to submit to the administration which English law authorises or imposes upon his trustees. The domicile of the testator and of the trust being English, the law of England alone settles the due administration of his estate by the trustees whom he has appointed."

And in *In re Georges; Buckle v. Carter* (1921), W. N. 41, where the will of a woman domiciled in Scotland was proved in England, Sargant, J., made an order declaring that, according to the true construction of the will and codicil, the trustees had an implied power of sale of certain heritable property in Scotland, and that a sale would be beneficial, authorised the trustees to apply to the Court of Session for liberty to effect such sale.

Nevertheless, Dicey considers that the doctrine as applied by Kekewich to English immovables is of doubtful validity. He is clearly of opinion that "the question at issue might have been decided on the simple ground that the land in England purchased by the husband represented movables, and therefore, must fall under the same principle as movables" (f).

The question as to the proper law to regulate the effect of marriage on the movable property of the husband and wife will be discussed subsequently.

(f) Conflict of Laws (1922), p. 555.

NOTE TO CHAPTER VI.

ON LEGITIMACY FOR THE PURPOSES OF SUCCESSION TO ENGLISH
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It is settled, by the decisions in *Freke v. Carbery* (1873), 16 Eq. 461, *Duncan v. Lawson* (a), and kindred cases, that leaseholds are *immovables*, and not *movables*, for the purposes of Private International Law, although they are personal estate by English law. The classification of property into *immovables* and *movables* is therefore not co-extensive with, and does not correspond to, the English classification into *real* and *personal*. The latter classification is peculiar to English law (b), and the maxim *mobilia sequuntur personam* cannot be correctly applied to it. It is further established by *Duncan v. Lawson*, that English leaseholds being immovables, the succession to them is regulated by English law—i.e. by the English Statute of Distributions—whatever the domicile of the intestate. This obviously implies the general proposition of which it is only a special application, that the succession to immovables is regulated by the *lex loci rei sitæ*.

It is proposed to consider here whether or not, for the purpose of succession to this kind of immovables, English law requires that the next of kin, whom it designates as successors, should fulfil any other condition but that of legitimacy by the law of their domicile.

A simple illustration will present the difficulty in a concrete form. A, a domiciled Englishman, dies intestate, possessed of English freeholds, English leaseholds, and English goods. He has no kindred except a nephew, a brother's son, born before wedlock in Scotland of parents there domiciled, but legitimised, *per subsequens matrimonium*, according to the law of the domicile. Now it is beyond all question that this child is *not* the heir to the English freeholds, because, although legitimate in the eye of the English law (following the *lex domicilii*), yet it is also the English law that no one can succeed to English freeholds who was not born in wedlock (c). It is also established by the decision of the Court of Appeal in *Goodman's Trusts* (overruling Jessel, M.R.), that this child is entitled to succeed to the goods or pure personality in England; because English law in general, and the Statute of Distributions in particular, adopts the law of the domicile of the person in question in deciding as to his legitimacy. The remaining question is, Whether or not the child can succeed to the leaseholds? To this question no satisfactory answer has yet been given.

The argument in support of the proposition that such child is excluded from the leaseholds may be presented in the following form—almost, in appearance, a perfect syllogism:—

- (A) No one can succeed to English immovables who was not born in wedlock (d).
(B) English leaseholds are English immovables (e).

(a) (1889), 41 Ch. D. 394; *ante*, p. 257. *Pepin v. Bruyère*, [1900] 2 Ch. 504; *De Fogassieras v. Duport* (1881), 11 L. R. Ir. 123.

(b) Jarman on Wills (1910), vol. i. pp. 3, 4.

(c) It will be seen by reference to the judgment of James, L.J., in *Goodman's Trusts* (1881), 17 Ch. D. at p. 298, that this is the effect of the decision in *Birtwhistle v. Vardill* (1826), 5 B. & C. 455.

(d) *Birtwhistle v. Vardill* (1826), 5 B. & C. 455; 7 Cl. & F. 895.

(e) *Duncan v. Lawson* (1889), 41 Ch. D. 394; *Pepin v. Bruyère*, [1900] 2 Ch. 504; *De Fogassieras v. Duport* (1881), 11 L. R. Ir. 123.

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Therefore a child not born in lawful wedlock cannot succeed to English leaseholds.

Of these two propositions, B is of comparatively recent date, but in principle it appears impregnable. In *Freke v. Carbery* it was held that the Thellusson Act applied to English leaseholds of a testator domiciled in Ireland, although that Act is not operative there. "Land," said Lord Selborne, "whether held for a chattel interest or held for a freehold interest, is in nature, as a matter of fact, immovable and not movable. The doctrine" (*mobilia sequuntur personam*) "is inapplicable to it." It is obvious that the *lex loci rei sitæ* must be the law to decide what is immovable and what is movable, inasmuch as it has the exclusive power of enforcing its view, and there is a consensus of opinion to this effect (*f*).

Independently of the decision in *Freke v. Carbery*, there was no want of *dicta* going further than this, and asserting the right of the *lex loci rei sitæ* to regulate the succession to leaseholds on this very ground. In Jarman on Wills (*g*) it is said, "leaseholds for years, though they are with us transmissible as personal estate, are governed by the *lex loci*, and do not follow the person; so that if an Englishman domiciled abroad dies possessed of such property, it will devolve according to the English law" (*h*). Westlake says: "Interests in land which are limited in duration, whether for terms of years, for life, or otherwise; interests in land which are limited in their nature, . . . servitudes, charges, liens, and all other dismemberments of the property in land, are immovables as well as the land itself (*i*). Upon this state of the authorities, it was decided by Kay, J., in *Duncan v. Lawson* (1889), 41 Ch. D. 394, that the *lex loci* governed the devolution of all *immobilia*, including leaseholds as well as the real estate in the English sense of the term; and therefore that the English Statute of Distributions was the law which must designate the persons entitled to succeed to English leaseholds left by an intestate domiciled in Scotland. The same principle has been adopted by the Irish Courts in *Re Gentili* (1875), Ir. Rep. 9 Eq. 541, and *De Fogassieras v. Duport* (1881), L. R. Ir. 123. The general rule, therefore, that leaseholds are immovables, for all purposes, including succession under a will or on intestacy, appears firmly established.

It remains to consider the other premiss or proposition of the syllogistic argument stated above—viz., that no one can succeed to English immovables who was not born in wedlock. Is this, without qualification or exception, the English law? It depends, if it is, upon the authority of *Birtwhistle v. Vardill*, and upon that alone; but it must be remembered that the decision in question was a judgment of

(*f*) Story, Conflict of Laws (2nd ed.), § 447; Westlake, § 146; *Buccleuch v. Hoare* (1819), 4 Madd. 467; *Harrison v. Harrison* (1873), 8 Ch. App. 342.

(*g*) (1910), vol. i. p. 4, n.

(*h*) It is true that this conclusion is questioned by the editors of Jarman, who cite some *dicta* in support of the other view: Jarm. Conv. vol. xi. p. 15 (3rd ed.); Deane on Wills, p. 15; *Price v. Dewhurst* (1837), 4 My. & Cr. 81; *Jerningham v. Herbert* (1829), 4 Russ. 388; *Pearmain v. Twiss*, 2 Giff. 136. It is, however, submitted that these authorities, though some of them say that it is for the English law, when the *lex loci rei sitæ*, to distinguish between real and personal property, are none of them inconsistent with the principle that it is also its function to distinguish between movables and immovables. They were all cited in the argument in *Freke v. Carbery*, and see now the cases cited *supra*, note (*e*).

(*i*) Priv. Int. Law (1922), § 157, p. 208.

the House of Lords, after taking the opinion of the judges; and a reference to the words of James, L.J., in *Goodman's Trusts* will show that no attempt to shake the authority of that judgment is likely to succeed. Whatever that case decided is law, and will be law unless altered by Act of Parliament.

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Now the actual decision in *Birtwhistle v. Vardill* was, that the eldest son born in Scotland before marriage of parents domiciled there, though by Scotch law legitimate *per subsequens matrimonium*, was not capable of taking land in England as heir of his father. "In that judgment," says James, L.J. (*k*), "there are two distinct propositions clearly and distinctly enunciated. The first was, that the claimant was for all purposes and to all intents legitimate (*l*). The second was, that such legitimacy did not necessarily, and did not in fact in that case, include heirship to English land. . . . What the assembled judges said in *Doe v. Vardill*, and what the Lords held, was that the case of heirship to English land was a peculiar exception to the rights incident to that character and status of legitimacy, which was admitted by both judges and Lords to be the true character and status of the claimant. It was only an additional instance of the many anomalies which at that time affected the descent of land. . . . The English heirship, the descent of English land, required not only that the man should be legitimate, but as it were *porphyro-genitus*, born legitimate within the narrowest pale of English legitimacy. Heirship is an incident of land depending on local law, the law of the country, the county, the manor, and even of the particular property itself, *forma doni*."

The language in which James, L.J., thus summarises the effect of *Birtwhistle v. Vardill* has been set out, because there can be no doubt that at first sight it does appear to be almost coincident with the proposition, that no one can succeed to English immovables who was not born in wedlock, so fulfilling the condition which was unfulfilled in that case (*m*).

It has already been shown that leaseholds are immovable and that "immovables" is only a phrase which expresses legal interests in land. And if the doctrine of *Birtwhistle v. Vardill* applies to *all* English immovables—i.e., to *all* interests in English land—then it seems impossible to escape from the conclusion of the syllogistic argument which was formulated above. The harshness of the proposition, that the Scotch (legitimised) nephew whose case is being considered could take the pure personalty, but not the English leaseholds, of his intestate

(*k*) *Goodman's Trusts* (1881), 17 Ch. D. at p. 298.

(*l*) This acceptance of the general principle that the legitimacy of every man depends upon the law of the domicile, was regarded by Lord Cranworth in *Shaw v. Gould* (1868), L. R. 3 H. L. 70, as rather in the nature of an *obiter dictum* in *Vardill's Case*. Though established in Scotch cases, there was a want of express English authority upon it until *Goodman's Trusts* was decided, the judgments in which virtually overrule *Boyes v. Bedale* (1863), 1 H. & M. 798, a decision of Wood, V.-C., certainly inconsistent with the general principle referred to. It has since been expressly adopted by the English Courts, both with regard to devises of immovables (*In re Grey's Trusts*, [1892] 3 Ch. 88) and bequests of movables (*Andros v. Andros* (1883), 24 Ch. D. 637).

(*m*) Although Lush, L.J., dissented from the rest of the Court in the case of *Goodman's Trusts*, from which the above language of James, L.J., is taken, yet it must be remembered that his dissent was on the ground that he wished to narrow, not the operation of the *lex loci rei sitæ*, but the operation of the *lex domicilii*.

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uncle is very apparent; and Dicey, in a note on the subject (n), draws attention to the point as still capable of discussion.

Shortly stated, it is submitted that the answer—if it be an answer—to the argument which has been presented above against the right of the imaginary Scotch nephew to the English leaseholds, is that *Birtwhistle v. Vardill* does not apply to all English immovables, but only to hereditaments. If so, the Scotch claimant need only be legitimate by the law of his domicil, and the further condition that he should have been also born in wedlock, which was required in *Birtwhistle v. Vardill*, has no application.

The question to be answered, therefore, is, whether the decision of the House of Lords in *Birtwhistle v. Vardill* applies to all immovables, or only to hereditaments. Upon this the first obvious remark is, that inasmuch as the claim in that case was to succeed *as heir* to English land, the actual decision was with respect to hereditaments; and if larger language than was necessary for this decision was used, so much of it as had a wider application was necessarily *obiter dictum*. The language in which James, L.J., summarises this judgment has already been quoted (o), but repetition may be excused here. "What the Lords held was that the case of *heirship* to English land was a peculiar exception to the rights incident to the character and status of legitimacy. . . . It was only an additional instance of the many anomalies which at that time affected the *descent* of land. . . . But in this particular case the exception is at all events plausible. The *English heirship*, the *descent of English land*, required not only that the man should be legitimate, but as it was *porphyro-genitus*, born within the narrowest pale of English legitimacy. . . . *Heirship* is an incident of land, depending on local law, the law of the country, the county, the manor, and even of the particular property itself, the *forma doni*. *Kinship* is an incident of the person, and universal."

The words which have been italicised in the above quotation show clearly, it is submitted, that James, L.J., at any rate, would not have regarded the decision in *Vardill's Case* as applicable to any interests in land other than hereditaments. It is true that Lush, L.J., the dissenting member of the Court, uses the looser expression "for the purpose of succession to real estate" (p), but there is not a word in his judgment to show that that learned Judge meant "real estate" to include chattels real, or used the word "succession" in any larger sense than that of heirship. Turning from the modern interpreters of *Birtwhistle v. Vardill* to the case itself, upon what is the whole argument against the claimant based? It will be found that it rests upon the Statute of Merton (q). That enactment arose from a proposition by the clergy at the Parliament of Merton to recognise legitimisation *per subsequens matrimonium*, in accordance with the doctrine of the Church. "*Rogaverunt omnes Episcopi magnates, ut consentirent, quod nati ante matrimonium essent legitimi, sicut illi qui nati sunt post matrimonium, quantum ad successionem hereditariam, quia ecclesia tales habet pro legitimis. Et omnes Comites et Barones unâ voce responderunt, quod volunt leges Angliæ mutare, quæ usitatae sunt ac approbatæ.*" It

(n) *Law Quarterly Review*, Oct. 1889, p. 443.

(o) *Goodman's Trusts* (1881), 17 Ch. D. 298.

(p) (1881), 17 Ch. D. at p. 284.

(q) 20 Hen. 3, c. 9.

would be difficult to find words which more precisely limited the doctrine to hereditaments, than those employed in the Statute itself—"quantum ad successionem hereditariam." It has been said that this statute was only declaratory of the Common Law. That, of course, appears from the language used; but it only declares the law "quantum ad successionem hereditariam," and if the same law exists with respect to succession to chattels real, it must be sought for elsewhere than in the Statute of Merton. Reference to the other authorities cited in *Vardill's Case* to support the doctrine of the Statute of Merton lend little assistance. Ducange (*sub voc. Legitimatio*) certainly uses the larger expression, "*quoad successionem in bona paterna*," but quotes for this chiefly ("*præsertim*") the Statute of Merton itself. Bracton (r) is also cited, where, speaking of *nati ante matrimonium*, he says, "*ad omnes actus legitimos idonei reputantur . . . ad ea vero quæ pertinent ad regnum, non sunt legitimi, nec hæredes judicantur, quod parentibus succedere possunt, propter consuetudinem regni, quæ se habet in contrarium.*" It may be suspected that, "*quod parentibus*" is an error for "*qui parentibus*" (s); but, however this may be, the whole passage is plainly confined to "*hæredes*," and is a singular parallel to the language of James, L.J., already cited from *Goodman's Trusts*. The titles of the sections of the chapter in Bracton, from which the quotation is taken, further indicate that the whole is a mere expansion of the phrase, "*hæres et filius est quem nuptiæ demonstrant*" (t). Fortescue (u), after pointing out that both by the civil law and the law of the Church, *ante-nati* are legitimate, says, merely, "The law of England does not admit children born before matrimony to take *by heirship*." Fleta (x) has already been referred to as virtually identical with Bracton, but it is worth noticing that in another passage the same author uses larger language "*(Ante nati) quoad successionem in bona paterna secundum consuetudinem Angliæ illegitimi et bastardi*" (y). It will be seen, however, that in the very same chapter the author declares the law of the Church to be otherwise, and it is difficult to reconcile the context with the idea that *bona paterna* included chattels.

The older authorities have been briefly reviewed, because most of them were cited in support of the Statute of Merton in the case of *Birtwhistle v. Vardill*; but since the decision of the Court of Appeal in *Goodman's Trusts* (z), it would, of course, be idle to rely on the words of Fleta or Ducange in order to show that *ante-nati* cannot inherit personally. The judgment of Lush, L.J. (*dissent.*), in *Goodman's Trusts* contains all that can be said in support of such a doctrine, but it was finally rejected by the Court; and it is now submitted that there are now no authorities left from which a similar disability can be deduced with respect to chattels real. So far as the attempt to

(r) Lib. ii. c. 29, s. 4.

(s) The version of the same words in Fleta (i. 15, 3) is "*nec parentibus succedere poterunt ut hæredes.*" It is true that "*qui parentibus*," &c., would, strictly speaking, require "*possint*" for "*possunt*," but this is perhaps expecting too much of Bracton.

(t) Bracton, ii. 29, s. 3.

(u) De Laud. Leg. Angl. cap. 39.

(x) Lib. i. 15, 3.

(y) Fleta, lib. vi. 39, 4.

(z) (1881), 17 Ch. D. 298.

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examine the grounds of *Birtwhistle v. Vardill* has been successful, that decision would seem to be confined, as the Statute of Merton beyond doubt was, to estates of inheritance in land. The conclusion which the author finally submits is, that there is nothing to prevent the application of the principle of *Goodman's Trusts* to English leaseholds, or to require anything more of the next-of-kin for the purposes of such succession than that he should be legitimate by the *lex domicilii*, in the sense elsewhere discussed (a).

(a) *In re Grove* (1887), 40 Ch. D. 216.

CHAPTER VII.

MOVABLE PERSONAL PROPERTY.

(i.) JURISDICTION AS TO MOVABLE PERSONAL PROPERTY.

It has been already noticed, while treating of the principle that it is the *lex situs* which must decide what does and what does not fall within the category of real or immovable estate (a), that the English classification of all property into *real* and *personal* does not correspond exactly with that adopted by foreign jurists and systems of jurisprudence which are founded on the civil law, and that an ambiguity is consequently involved in the use of the words *personal* and *movable* as synonymous. The comparatively modern nature of chattel interests in land, which were unknown to the feudal system, and could not conveniently be subjected to its rules, caused them to be classed with the only other kind of property then recognised by the law, *goods and chattels*; being given the distinguishing name of *chattels real*, inasmuch as they were said to “savour of the realty” (b). But though such chattels interests are still, strictly speaking, personal property, they are so merely in name, and only in the contemplation of the English law; and are governed, like other immovables, by the *lex loci rei sitæ* only (c). It will be shown presently that personal estate generally is governed by the law of the domicile of the owner; but this is so, not by any special law of England, but—as Lord Selborne expresses it in the case just cited—by the deference which, for the sake of international comity, the law of England pays to the law of the civilised world generally. But this general law only applies the law of the domicile to such personal estate as comes within its category of movables according to the maxim “*mobilia sequuntur personam*,” on which it is based. Consequently the comity of nations does not demand that England should concede the control of English chattels real to the law of the domicile of the owner, simply because English law chooses to include such chattels under the classification of personal property, and it

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disting-
guished.(a) *Supra*, pp. 239 *seq.*(b) Williams, *Personal Property* (1906), p. 5.(c) Jarman on Wills (1910), vol. i. p. 3 n.; *Freke v. Lord Carbery* (1873), L. R. 16 Eq. 461.

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*Movables—
Jurisdiction.**Mobilia
sequuntur
personam.*

must be borne in mind throughout that in fact such a concession is not made (*d*). As the term “movables” is not one familiar to English law, it has been thought better to retain the English classification of real and personal property while treating of this subject; but what is subsequently said as to the law which governs personal property does not extend to chattel interests in realty, and must be considered as applicable to *chattels personal* alone.

With regard, then, to all personal property other than chattels real, a rule very different from that which obtains with regard to “immovables” prevails. In the words of Lord Selborne in *Freke v. Carbery*, “The maxim of the law of the civilised world is, *mobilia sequuntur personam*, and is founded on the nature of things. When *mobilia* are in places other than that of the person to whom they belong, their accidental *situs* is disregarded, and they are held to go along with the person.” The same principles were laid down by Lord Loughborough in a judgment cited with approbation by Story (*e*). “It is a clear proposition, not only of the law of England, but of every country in the world where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner.” With respect to the disposition of it, with respect to the transmission of it, either by succession or the act of the party, it follows the law of the person (*f*). This personal law is, of course, that of the domicile of the person (*g*). It is true that Lord Loughborough, in the judgment just quoted from, goes on to say that when a man dies it is the law of the country of which he was a subject that will regulate the succession to his personal property; but it is obvious that this was a mere inaccuracy of expression, and *Pipon v. Pipon* (1744), Ambl. 25, which Lord Loughborough cites in support of his proposition, shows that domicile, and not nationality, was really in his lordship’s mind. In *Birtwhistle v. Vardill*, already frequently cited for another important proposition, Abbott, C.J., said: “Personal property has no locality. And even with respect to that, it is not correct to say that the law of England gives way to the law of a foreign

(*d*) *Freke v. Lord Carbery* (1873), L. R. 16 Eq. 461; *Thomson v. Advocate-General* (1845), 12 Cl. & F. 1; *Wallace v. Attorney-General* (1865), L. R. 1 Ch. 1; cf. Story, *Conflict of Laws*, § 447.

(*e*) Story, *Conflict of Laws*, § 380.

(*f*) *Sill v. Worswick* (1791), 1 H. Bl. 690. But in the case of an intestate, bastard, and without heirs, there is no “succession”; and the *lex loci* of the property determines its destination (*Barnett’s Trusts*, [1902] 1 Ch. 847).

(*g*) *Dogliani v. Crispin* (1866), L. R. 1 H. L. 301; *Enohin v. Wylie* (1862), 10 H. L. C. 1.

country, but that it is part of the law of England that personal property should be distributed according to the *jus domicilii*." It was said by Bayley, B., in *In re Erwin* (1830), 1 C. & J. 156 : "The rule is that personal property follows the person, and is not in any respect to be regulated by the *lex situs*; and if in any instances the *situs* has been adopted for the rule by which the property is to be governed, and the *lex loci rei sitæ* resorted to, it has been improperly done. Wherever the domicile of the proprietor is, there the property is to be considered as situate." It is unnecessary to multiply quotations in support of the general principle, which, according to Story, has been constantly maintained, both in England and America, with unbroken confidence and general unanimity (*h*).

But this general principle, important as it is in theory, must not be accepted hastily as conclusive of the whole subject. It will be shown below (*i*) that alienations of personal property *inter vivos* are in practice referred to and governed by the law of the place where the chattel is *in fact*, at any rate when the transaction or transfer takes place within the same jurisdiction. For this purpose it is not true to say that the chattel is considered as being in the country where its proprietor is domiciled; and the cases which have just been cited must therefore be read *secundum subjectam materiam*, without attempting to stretch their principle too far. The reason that the *lex domicilii* is not applicable, or at any rate is not applied, to alienations *inter vivos* is perhaps twofold. In the first place, the effect of an alienation is to alter the ownership; and to invoke the law of the owner's domicile to decide who the owner is would be both illogical and impracticable. Where the domicile of the transferee differed from that of the transferor, the whole question would be begged by applying the law of the domicile of one rather than the other. The second obvious reason which supports the *lex domicilii* in such cases is the complement of the first. The proper law to decide who is entitled to possession of a chattel is necessarily the law which can give that possession. The only law which can give possession of a chattel is the law of the country where the chattel in fact is.

It is for these natural reasons that questions of ownership to movables arising out of alienations *inter vivos* are referred, as

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Qualifica-
tion of
mobilia
sequuntur
personam.

Transfer
inter vivos.

(*h*) See, in addition to the cases already cited, *Potter v. Brown* (1804), 5 East, 130; *Bruce v. Bruce* (1790), 2 B. & P. 229; *Somerville v. Somerville* (1801), 4 Ves. 570; *Thorn v. Watkins*, 2 Ves. 37; *Countess Da Cunha's Case* (1828), 1 Hagg. Eccl. 237; *Hunter v. Potts* (1791), 4 T. R. 182, 192; *Phillips v. Hunter* (1795), 2 H. Bl. 402; *Cockerell v. Dickens* (1840), 3 Moo. P. C. 98. Cf., however, Westlake, *Priv. Int. Law* (1922), pp. 187 seq.

(*i*) See *infra*, "Alienation of Personal Property."

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Rule as to
trans-
mission and
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of movables.

will be seen below (k), not to the *lex domicilii*, but to the *lex loci rei sitæ*, either by itself or as coincident with the *lex loci actus*. That the same principle should not be applied to alienation of movables by operation of law, or what are sometimes spoken of as “general assignments” as contrasted with “particular assignments,” may at first sight appear inconsistent. But it is manifest that there is a real distinction between the application of the personal law of the owner to decide the general destination and distribution of his movables, and the application of the local law, where movables are found, to decide in particular cases who the owner is. In accordance with this distinction, it will be found, on examination of the cases, that the transmission of movables on death, bankruptcy, and marriage, or arising from matters which affect the personal status of the owner, is regarded as properly falling within the province of his personal law, or *lex domicilii*. On the other hand, particular alienations *inter vivos* have never been referred to the *lex domicilii*, but are governed (as has just been stated) by the *lex loci rei sitæ*, and the *lex loci actus*, alone or in combination (l).

The question of *jurisdiction* can only be understood in relation to the above principles. In fact, the law of the place where a thing is must, of necessity, have jurisdiction over it in every case, because no other law can enforce the right to its possession. In this sense, therefore, the *lex loci rei sitæ* has universally jurisdiction over movables, as well as immovables. But in cases which properly fall under the control of the *lex domicilii*, or personal law, the local law will adopt and apply the principles of that personal law; and the personal law, though the movables in dispute may be beyond its territorial dominion, will assume the right to hear and decide questions relating to their transmission and distribution. In this sense, therefore, the *lex domicilii* has jurisdiction over movables, so far as they follow the person of their owner (m).

English
practice.
Service out
of the juris-
diction of
writ
affecting
movables.

It remains to consider in what manner these conflicting theoretical jurisdictions are in fact reconciled by the practice of English law. The most efficient mode of asserting jurisdiction over movables, as distinguished from jurisdiction over the person of the owner, is by allowing service out of the territorial jurisdiction of a writ (or notice of a writ) whose subject-matter is

(k) *Infra*, pp. 279 seq.

(l) *Infra*, pp. 286 seq.

(m) In many instances it will be found that questions of the alienation of movables are questions of contract. In such cases the *lex loci contractus* is introduced, and the *lex loci rei sitæ*, when appealed to, will rightly and properly apply that law, so far as it can be ascertained, having due regard to the intention of the parties (cf. *infra*, chap. viii.). But it would be a misuse of language to say that the *lex loci contractus* has jurisdiction over the movables affected by the contract.

movable goods within the territorial jurisdiction. So far as the theory of international law is concerned, there does not appear any reason why this should not be done; and in the (Judicature Acts) Rules, as originally drawn, it was provided that service out of the jurisdiction might be allowed (*inter alia*) "whenever the subject-matter of the action is land, stock, or other property situate within the jurisdiction" (*n*), and also "whenever the action is for . . . the execution (as to property situate within the jurisdiction) of the trusts of any written instrument of which the person to be served is a trustee, which ought to be executed according to the law of England" (*o*). In practice, however, the process of English law is *in personam* and not *in rem*, and the ordinary rule that a creditor must go to the *forum* of his debtor in order to sue him was found to be in conflict with the application of the first part of the above rule. Accordingly, the rule was amended in 1883; and Order XI. r. 1 (*a*), in its present form is confined to cases in which the subject-matter of the action is *land* within the jurisdiction. It is obvious that whenever movables are found within the jurisdiction, they must be in the possession of some person; and there can, therefore, be seldom any difficulty as to finding a suitable defendant at home, without seeking one abroad. The English Courts will therefore no longer give leave to serve a writ abroad merely on the ground that it relates to movable property at home. Nor will they permit the service abroad of any notice on which it is intended to found proceedings against the person (*p*), unless otherwise justiciable to the Court. But notices have been served, with the permission of the Court, when their only object is to give notice of facts, and not to lay the foundation for hostile proceedings (*q*). So, when the object of the notice is to invite and enable the person served to assert a claim to movables within the jurisdiction, service has been allowed even as against a foreign Sovereign (*r*).

The jurisdiction in respect of movables within the territory, however, clearly exists; and may be exemplified, not only by the retention of Order XI. r. 1 (*d*), above cited, but by other illustrations. The whole procedure of the Court in Admiralty

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(*n*) Jud. Act, Order XI. r. 1 (*a*) (before their alteration).

(*o*) Order XI. r. 1 (*d*). The whole order is now a code on the subject of service out of the jurisdiction: *Re Eager, Eager v. Johnstone* (1883), 22 Ch. D. 87; see the order set out *infra*, chap. 10.

(*p*) *In re Anglo-African Steamship Co.* (1886), 32 Ch. D. 348; *Moritz v. Stephan* (1888), 32 Sol. Journ. 8. Cf. *Smith v. Wequelin* (1869), 8 Eq. 198.

(*q*) *Re Nathan, Newman & Co.* (1887), 35 Ch. D. 1; *Credits Gerundeuze v. Van Weyde* (1884), 2 Q. B. D. 171; *Re Haney's Trusts* (1875), 10 Ch. 275; *Re Bonelli* (1875), 18 Eq. 655; *Colls v. Robins* (1886), 55 L. T. Rep. (N.S.) 479.

(*r*) See per Jessel, M.R., and James, L.J., in *Strousterg v. Republic of Costa Rica* (1880), 29 W. R. 125.

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matters, *in rem*, to enforce maritime liens (statutory or common law) is a strong assertion of such jurisdiction (*s*). The law of distress is a still more familiar instance. No one could doubt that the goods of a foreigner, though he be abroad, are subject while in England to the English landlord and tenant law. Cases in which the Court (except in Admiralty matters) has assumed to control movables simply on the ground of their being within the territory are comparatively unusual; but an injunction was granted against the removal of a ship which had been sold in Hamburg by a foreigner to an Englishman, and afterwards brought into an English port (*t*). So in another case, where £20,000 in bonds was deposited in the Bank of England in trust for a foreign Government, on such terms that the foreign Government could by its ambassador have withdrawn the deposit but for the intervention of the Court, the Bank was restrained from parting with the deposit until the rights of the parties under contract had been ascertained (*u*). In cases of interpleader, orders for service out of the jurisdiction of an interpleader summons have more than once been made (*x*). Of these decisions Cotton, L.J., says they may “perhaps be supported on the ground that the object of service was not to give jurisdiction over the party served, but only to give him notice of a proceeding affecting his rights, that he might if he pleased come in and defend them” (*y*). But it is plain that notice of interpleader proceedings asserts an absolute right in the tribunal which gives it to deal as it chooses with the movable personalty to which the interpleader summons relates. Interpleader proceedings with respect to movables out of the jurisdiction would obviously be impossible unless the person who had actual control and possession of the movables in dispute came in and submitted to the English jurisdiction. It is an indispensable condition of relief by interpleader proceedings that the person who is threatened or vexed with a double claim should be willing “to pay or transfer the subject-matter into court, or to dispose of it as the Court or a judge may direct” (*z*). And leave has been given to serve petitions abroad to obtain payment out of Court, a somewhat analogous case of dealing with movables on

Interpleader
orders—
service
abroad.

(*s*) Admiralty law is the same in Scotland as in England; cf. *Currie v. McKnight*, [1897] A. C. 97.

(*t*) *Hart v. Herwig*, 8 Ch. 860. In this case a bill for specific performance was also entertained, and substituted service directed on the master; but *quære* if this would now be done.

(*u*) *Gladstone v. Musurus Bey* (1862), 1 H. & M. 495; see this case discussed in *Smith v. Weguelin* (1869), 8 Eq. 214, 215.

(*x*) *Credits Gerundeuse v. Van Weyde* (1884), 12 Q. B. D. 171; *Van der Kan v. Ashworth* (1884), W. N. 58.

(*y*) Per Cotton, L.J., in *In re Busfield* (1886), 32 Ch. D. 123, 132.

(*z*) Judicature Rules, 1883, Order LVII. r. 2 (c).

the ground of their actual situation (a). Except, however, for the purpose of dealing with property within the jurisdiction, a suit between foreigners will not be entertained, even if service is effected and appearance entered without objection (b).

Leave has been granted to serve notice of a writ abroad where an injunction was sought affecting funds in England, under Order XI. r. 1 (f). It was, however, held on appeal that, as a matter of discretion, such leave should not be given unless there is a *probable* cause of action, though the claim may be within the words of the rule (c). Where the sole respondent to a petition for the revocation of a patent was a domiciled Scotchman resident in Scotland, though there could be no service of the petition abroad, yet the Court ordered the petition to be set down for trial unless the respondent should come in and show cause to the contrary, being satisfied that he had in fact ample notice (d).

The liability of movable personal estate to taxation is not strictly within the scope of the present treatise; and in view of the constant changes in the law and practice it has been deemed advisable not to attempt to summarise the English law as to the application of the income tax to foreigners in respect of their annual gains or profits as well as to Englishmen making profits abroad. Accordingly, the summary contained in the last edition, and now completely out of date, has been omitted. On this topic reference may be made to "The Law of Income Tax," by E. M. Konstam, Esq., K.C. (2nd ed., 1923).

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Taxation—
liability to
income tax

ALIENATION OF PERSONAL PROPERTY.

The general principle being that movable personal property is governed by the law of the owner's domicile, it will be as well to consider its application more particularly with regard to its alienation. Alienation of personal property is either by the act of the owner, or by the act of the law. In the first of these cases it is either by transfer *inter vivos*, or by bequest. In the second case it may be either by succession, by assignment on bankruptcy, or by the operation of marriage. Each of these cases requires separate consideration.

(a) *Colls v. Robins* (1886), 55 L. T. Rep. (N.S.) 479; *Re Turner*, 32 Sol. Journ. 324.

(b) *Matthæi v. Galitzin* (1874), L. R. 18 Eq. 347. It should be noted, however, that the decision in this case related to the profits arising from foreign land, and that no question as to movables arose.

(c) *Société Générale de Paris v. Dreyfus* (1887), 37 Ch. D. 215. Cf. *Call v. Oppenheim* (1885), 1 T. L. R. 622.

(d) *Re Drummond* (1890), 43 Ch. D. 80.

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Movables—
Jurisdiction.Transfer of
movables.(ii.) ALIENATION BY TRANSFER *Inter Vivos*.

Notwithstanding the general principle that movables are governed by the law of the domicile of the owner, it has been already stated (*supra*, p. 279) that this principle does not apply to the alienation by the owner of movables by transfer *inter vivos*. Such transfers are, in fact, regulated by the law of the place where the movables happen to be (*lex situs*), which is usually also the place where the forms of transfer are gone through. "It is settled, as to personal chattels," said Kay, L.J., in *Alcock v. Smith*, [1892] 1 Ch., at p. 267, "that the validity of a transfer depends, not upon the law of the domicile of the owner, but upon the law of the country in which the transfer takes place." It appears from the illustrations given, which follow the above quotation, that the learned judge was contemplating the simple cases of transfers of movable property actually within the jurisdiction where the transfers take place (e).

It is, of course, important, in considering this question, to distinguish between a *contract* to transfer, and the transfer itself. Two Englishmen may undoubtedly contract either in England or in Germany for the sale of movable property belonging to one of them which is actually in France; and the contract may be perfectly good though the law of France regard it as insufficient. There may and usually will be a contract enforceable in the English Courts, either by an action for damages or in some cases by a suit for specific performance. But such a contract will not *pass the property* in the movables with which it deals if the law of the country where the movables are requires delivery or some other formality as an essential part of the transfer. The validity of the contract is tested by the law of the contract. The law of the contract is not always the law of the place where the contract is made, the place of intended performance, the domicile of the contracting parties, and their presumed intention as to the law which is to govern their agreement being all important elements in deciding this question. But it is submitted that, so far as the actual transfer of title and the right to possession are concerned, the law of the place where the movables are must prevail over the law of the domicile of the parties, and probably over the law of the place where the attempted transfer takes place (f). The law

(e) "Our own law as to distress and market overt is illustrative of this. The goods of a foreigner distrained in the house tenanted by an Englishman in this country may be sold for the tenant's rent, and the purchaser acquires a perfect title, whatever may be the law of the owner's domicile. So the goods of a foreigner sold here in market overt by one who had no title to them could not be recovered from the purchaser. In both cases the property would pass to him by our law." (*Ibid.*)

(f) *Cammell v. Sewell* (1858), 27 L. J. Ex. 447; 29 L. J. Ex. 350; *Castrique*

has been stated by North, J., as follows: "A transfer of movable property duly carried out according to the law of the place where the property is situate, is not rendered ineffectual by showing that such transfer . . . is not in accordance with what would be required by law in the country where the owner is domiciled" (g). In the case in which this was said, the doctrine was applied to an assignment (by legal process of arrestment) of debts or choses in action.

In *Mehra v. Sutton* (1913), 109 L. T. 529, where the defendant in London by his agent had obtained certain pearls from the plaintiffs in Paris by larceny, or by a trick in English law or *vol* in French law, it was held by the Court of Appeal that the defendant did not obtain possession of the pearls with the consent of the plaintiffs, who were consequently entitled to recover.

The attention of writers on international law does not seem to have been always directed to this distinction, and their language is not always consistent with the views above expressed. In Story's *Conflict of Laws*, it is said in the text that "it follows as a natural consequence of the rule (that personal property has no locality) that the law of the owner's domicile should in all cases determine the validity of every transfer, alienation, or disposition made by the owner, whether it be *inter vivos* or post-mortem" (h). If this language could be supported by the American cases, they would be in direct conflict with the English authorities, so far as alienation *inter vivos* is concerned. But the learned editor of the last edition of Story (1883) (i) commences a long and elaborate note on this passage by saying that the exceptions to the maxim "*mobilia sequuntur personam*" have become so numerous that it cannot be safely invoked for any but the simplest cases at the present day; and he adds: "*The exceptions would probably be less frequent if the maxim were 'lex situs mobilia regit.'*" Moreover, Story himself, in the same passage, excepts out of the supposed rule all cases where there is some law of the country where the goods are situate, providing for special cases; and further goes on to distinguish between the contract to transfer, and a "positive transfer" itself. It is submitted that it would be an abuse of language to lay down the rule of the *lex domicilii* if the rule of the *lex situs* is one to which there would be fewer exceptions;

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Opinion of
Story—
modified by
his editors.

v. *Imrie* (1870), L. R. 4 H. L. 414; *Hooper v. Gumm* (1867), L. R. 2 Ch. 282; *Williams v. Colonial Bank* (1890), 38 Ch. D. 388, affirmed H. L. May 13, 1890; *Alcock v. Smith*, [1892] 1 Ch. 238.

(g) *Re Queensland Mercantile & Agency Co.; ex parte Australasian Investment Co.*, [1891] 1 Ch. 536; [1892] 1 Ch. 219, C. A.

(h) Story's *Conflict of Laws*, § 383.

(i) Melville M. Bigelow.

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Local nature
of certain
movables—
contracts
affecting
them.

English
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and that it is desirable rather to distinguish those kinds of alienation which are governed by the *lex situs* from those in which the maxim of the *lex domicilii* can still be safely invoked. So far as alienation or transfer of movables *inter vivos* is concerned, it is believed that the American cases are not in conflict with the English doctrine of the prevalence of the *lex situs* (*k*).

It is pointed out by Story (§ 383), citing with approval the language of Lord Mansfield in one of the earliest cases (*l*) on the subject, that there are some kinds of personal property which from their own nature have a necessarily implied locality, and that the local nature of such movables requires contracts respecting them “to be carried into execution according to the local law.” Story applies the same rule to “all other local stock or funds, although of a personal nature, or so made by the local law; such as bank stock, insurance stock, turnpike, canal, and bridge shares, and other incorporeal property owing its existence to or regulated by peculiar laws.” There is no doubt that personal property of the kind mentioned is so intimately connected with its locality that the reasons for regulating transfer of such property by the local law are additionally strong; but Lord Mansfield’s language, when looked at, shows that he was speaking rather of the contract to transfer than of the transfer itself (*m*), the only instance given by him (applicable to movables) being “a contract concerning stocks.” It has already been said that the question of the proper law to govern a contract is quite distinct from that of the proper law to govern a transfer of movables: and Lord Mansfield’s reference to the intention of the parties as an element in deciding that law is quite in harmony with the modern cases on the subject (*n*).

In support of the proposition that the *lex situs*, or at any rate the *lex situs* when the *situs* is also the place of the transaction, governs alienation of movables, it is necessary to examine more in detail the English cases. In *Simpson v. Fogo* (1860), 1 H. & M. 195, the Courts of Louisiana had refused to recognise

(*k*) See Bigelow’s note, above cited, to Story, § 383, p. 544 (ed. 1883).

(*l*) *Robinson v. Bland* (1760), 2 Burr. 1079; 1 W. Bl. 247; Story, §§ 364, 383.

(*m*) “In every disposition or contract where the subject-matter relates locally to England, the law of England must govern, and must have been intended to govern. Thus, a conveyance or will of land, a mortgage, a contract concerning stocks, must all be sued upon in England; and the local nature of the thing requires them to be carried into execution according to the law here”: 2 Burr. 1079.

(*n*) See, e.g. *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. 589, 599; and on this subject generally, see *infra*, chap. viii. As to the effect of a transfer in another country of certificates of stock in a foreign railway, see judgment in *Williams v. Colonial Bank* (1890), 38 Ch. D. 388. *Colonial Bank v. Cady* (1890), 15 App. Cas. 267; *In re Queensland, &c., Co.*, [1892] 1 Ch. 216.

the rights of a mortgagee of a British ship, which had been taken by the mortgagors to New Orleans, and was there attached by other creditors without ever having been delivered to the mortgagees. The ship having come again within British jurisdiction, the mortgagees filed a bill to enforce their rights, and Lord Hatherley refused to recognise the judgment and order of the Louisiana Court, under which the ship had been sold, as being directly contrary to the comity of nations. It is to be remarked that in this particular case the transfer by way of mortgage had been completed long before the ship came within the Louisiana jurisdiction, and Lord Hatherley said that, in his opinion, the American Court was bound to have recognised the principle that a title which a man has legally acquired in one country shall be a good title to him all over the world; further citing with approval the language of an American judge in *Thuret v. Jenkins*, 7 Martin, 353: "If, therefore, according to the *lex loci contractus*, that of the domicile of both parties, the sale transfers the property without delivery, it does so *eo instanti*, or not at all. If two persons in any country choose to bargain as to the property which one of them has in a chattel not within the jurisdiction of the place, they cannot expect that the rights of persons in the country in which the chattel is will there be permitted to be affected; but if the chattel be at sea or in any other place, if any there be, in which the law of no particular country prevails, the bargain will have its full effect *eo instanti* as to the whole world, and the circumstance of the chattel being afterwards brought into a country, according to the laws of which the sale would be invalid, would not affect it." It is to be observed that in *Simpson v. Fogo* the assignment had been completed before the chattel came within the Louisiana jurisdiction, so that the assumption of the Louisiana Court to pronounce upon its ownership must be regarded as wholly unwarrantable from an English point of view. Had the ship been at New Orleans when the mortgage was effected, the validity of the attempted assignment would have been *prohibited* by the *lex loci rei sitæ*, and Lord Hatherley's strictures upon the Louisiana judgment would have been uncalled for (o). The decision, however, in *Simpson v. Fogo* cannot now be regarded as an authority for the proposition that a foreign judgment is examinable by an English Court for a mistake in private international law, or even for a violation of the rights of nations. It is established by the decision of the House of Lords in *Castrique v. Imrie* (1870), L. R. 4 H. L. 414, that the validity of a foreign judgment can be impeached on no such grounds,

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Valid trans-
fer by the
lex situs.

(o) *Liverpool Marine Co. v. Hunter* (1867), L. R. 3 Ch. 481.

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Transfer
valid by *lex
situs*, but
not by *lex
domicilii*.
*Cammell v.
Sewell*.

except only in cases where the foreign Court has wrongfully assumed a jurisdiction which did not properly belong to it. Blackburn, J., in that case, while commenting on *Simpson v. Fogo*, clearly indicates that the judgment may be supported without impeaching the general proposition that a foreign judgment cannot be examined for error in law, domestic or international, except as to the grounds of its jurisdiction; and if the decision is inconsistent with this theory, it must be regarded as overruled (*infra*, chap. xi.).

Next, with regard to the validity of a transfer of personal chattels which is only good by the *lex loci rei sitæ*, and not supported by the *lex domicilii*, it appears to have been decided by the case of *Cammell v. Sewell* (p) that such a transfer is regarded as good and sufficient by English law. In that case a cargo of timber which had been wrecked on the coast of Norway was sold there by the captain of the vessel, improperly according to English law, but under such circumstances as to convey a good title to a *bonâ fide* purchaser according to the law of Norway. The timber having been re-sold and brought to England, the English merchant brought trover for it, and it was decided (Byles, J., *dissentiente*) that the action could not be maintained. In pronouncing the judgment of the majority of the Court, Crompton, J., said, after stating the effect of the Norwegian law on the subject: "It does not appear to us that there is anything so barbarous or monstrous in this state of the law that we can say that it should not be recognised by us. Our own law as to market overt is analogous. . . . Many cases were mentioned in the course of the argument, and more might be collected, in which it would seem hard that the goods of foreigners should be dealt with according to the laws of our own or of other countries. Among others, our laws as to the seizure of a foreigner's goods for rent due from a tenant, or as to the title gained in them, if stolen, by sale in market overt, might appear harsh. But we cannot think that the goods of foreigners would be protected against such laws, or that if the property once passed by virtue of them, it would be changed by being taken by the new owner into the foreigner's own country. We think that the law on this subject was correctly stated by the Lord Chief Baron in the course of the argument in the Court below, where he says, 'If personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere'; and we do not think that it makes any difference that the goods were wrecked, and were

(p) (1858), 27 L. J. Ex. 447; 3 H. & N. 617; S. C. on appeal, 29 L. J. Ex. 350.

not intended to be sent to the country where they were sold. We do not think that goods which were wrecked here would on that account be less liable to our laws as to market overt, or as to the landlord's right of distress, because the owners did not foresee that they would come to England." *The Segredo* (1853), Spinks, 1 Ecc. & Ad. 36, which was relied upon in the argument in *Cammell v. Sewell* as an authority for the plaintiff's contention, was referred to with disapprobation in the judgment just quoted, and the Court said that if Dr. Lushington's judgment in that case was relied on as an authority that the effect of a law of a foreign country, as to the passing of property in a foreign country, was to be disregarded, they were prepared, sitting as a Court of error, to dissent from it. So, it seems that the Dutch law as to market overt might have had the effect of passing the property in a cargo sold in the Cape of Good Hope, when the law of Holland prevailed there, if the circumstances of the knowledge of the transaction had not taken the case out of the provisions of such law (*q*). In *The Gratitude* (1801), 3 C. Rob. 258, speaking of the circumstances under which the captain of a ship might exercise his judgment as to the sale of a cargo in emergencies, Lord Stowell said, "If the master acts unwisely in that decision, still the foreign purchaser will be safe under his acts." And so in *The Luna*, [1920] P. 22, it was held that the foreign master of the *Luna*, who had entered into a towage contract with an indemnity clause, had authority to bind his owners, and that accordingly the owners were liable to indemnify the owners of the vessels injured by the *Luna*.

The general principle thus laid down, that if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere, came under the notice of the House of Lords in *Castrique v. Imrie* (1870), L. R. 4 H. L. 414. That case was decided on the principle of the validity of a foreign judgment *in rem* (*r*), which, in the words of Blackburn, J., in that case, is in truth but a branch of the more general principle which is enunciated in *Cammell v. Sewell*; and it was not there necessary to resort to any such larger principle, or to inquire what qualifications, if any, ought to be attached to it as a general rule. Nevertheless, Blackburn, J., intimated his opinion that the general principle of the validity of a transfer made according to the *lex loci rei sitæ* was correct, though no doubt it might be open to exceptions

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Movables—
Alienation.

Doctrine of
Cammell v.
Sewell.Judgment
in rem.

(*q*) *Freeman v. E. I. Co.* (1822), 5 B. & Ald. 617, explained by Crompton, J., in *Cammell v. Sewell*, *supra*.

(*r*) As to the validity of a foreign judgment *in rem*, see also *Clydesdale Bank, Ltd. v. Schroeder*, [1913] 2 K. B. 1.

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and qualifications. It would be difficult, perhaps, to name a general principle of which the same might not be said; and the opinion of Keating, J., in the same case, was avowedly and entirely based on the decision in *Cammell v. Sewell*, and the principles to be drawn therefrom. *

The principle of *Cammell v. Sewell* is entirely consistent with the decision in *Hooper v. Gumm* (1867), 2 Ch. 282, on appeal from the judgment of Wood, V.-C. There certain shipbuilders in America had built several ships, mortgaged them there, sent them to England for sale, sold them there, and paid the mortgagees in America. The mortgages were duly registered in America, but notice of the mortgage being indorsed on the certificate of registry, and having in one case impeded the sale, it was agreed that no such notice should be indorsed in future. Another ship was accordingly sent over and sold, no notice of the American mortgage being indorsed on her certificate of registry, and the American shipbuilders having failed after receiving the money, the mortgagee filed his bill against the purchaser. He failed eventually, on the ground that he had so acted as to suppress the mortgage, and make the ship-builders his agents for the sale, but the language of Turner, L.J., is important with reference to the validity of the sale itself. "In my opinion, the law of this country ought to govern the decision of the case; *for the purchase of the ship, on which the rights of the question depend, was made and completed in this country.* In saying this, however, I must not be understood to mean that the shipping law of America is not to be regarded in deciding the case; on the contrary, I think that great regard must be paid to it. In order to determine what the rights of these parties now are, it must be ascertained what their rights were at the time when the purchase in question was made, and, in order to ascertain this, resort must be had to the American shipping law. The rights of the parties stood upon that law at the time when this purchase was made, and I apprehend that, where rights are acquired under the laws of foreign States, the law of this country recognises and gives effect to those rights, unless it is contrary to the law and policy of this country to do so." It will be seen from the facts in *Simpson v. Fogo*, 1 H. & M. 195, that the American Courts are not equally ready to recognise the rights of property which the laws of foreign States have conferred; but it is plain, from the above citation, that in *Hooper v. Gumm* the validity of the sale in England was referred to the English law alone, and the fact that English law in that case was unusually ready to guide itself by the rules of foreign jurisprudence does not affect the principle. So in *Castrique v. Imrie*, where a sale

had been decreed under the judgment of a French Court, it was said that even if the English tribunal could review the foreign judgment, the sale in France, made under it, would remain valid, and the title of the purchaser be protected. In *Alcock v. Smith*, [1892] 1 Ch. 238, a judicial sale in Sweden of an English bill of exchange, attached when overdue, in the hands of a holder affected with notice of equities, was held to confer a good title to the proceeds of the bill notwithstanding. And the question of the title to certificates of shares in American railways, indorsed on the back with blank transfers and delivered to English brokers in London, was similarly referred to English law (s). So the right to bring an action to recover such *certificates* depends upon the validity of the transfer according to the law of the place where it was executed, whatever may be the law of the country where the railway is situate with regard to the property in the *shares* (t). According to the language of Lindley, L.J., in *Williams v. Colonial Bank* (s), it would seem indisputable that the property in the shares must depend on the *lex situs*, as in all other cases of title to immovables.

In *In re Korvine's Trusts; Levarhoff v. Block*, [1921] 1 Ch. 343, Admiral Korvine, a domiciled Russian resident in London, on 27th February, 1919, placed a sum of £1,000 to the credit of himself and Block in a bank and instructed Block after payment of his funeral expenses and debts to pay the residue to the plaintiff and also to give to her certain bonds and jewellery. On the next day the admiral went into a nursing home where he died intestate on 9th April, 1919. Eve, J., held that the gift of the money, bonds and jewellery was a good *donatio mortis causa* by English law, and that although the gift was consummated by the death of the donor, it was not a legacy or a testamentary act, and that it was a gift although an incomplete gift *inter vivos*. And notwithstanding that the gift was liable to the donor's debts upon a deficiency of assets and was also subject to legacy and estate duty, the law to be applied was that applicable to gifts *inter vivos* and not that applicable to testamentary disposition. If the gift had been of the nature of a testamentary disposition the *lex domicilii* would have applied.

In *Rey v. Lecouturier*, [1910] A. C. 262, it was held that the monks formerly of La Grande Chartreuse in France retained the benefit of a trade mark, which had indicated that a certain liqueur was their personal manufacture, although by French law their property had passed to a liquidator. Thus, with respect to the

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Effect in
England of
assignment
by foreign
enactment.

(s) *Williams v. Colonial Bank*, *Williams v. Chartered Bank of Australia* (1888), 36 Ch. D. 659; 38 Ch. D. 388; affirmed H. L. May 12, 1890.

(t) *Colonial Bank v. Cady* (1890), 15 App. Ca. 267; 60 L. J. Ch. 131.

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effect on England of an assignment by a foreign statute, the proposition may be laid down that, where a person carries on a business in England, the enactment of a foreign Government—like the judgment of a foreign Court—vesting in another the goodwill and property in such business, does not entitle the latter to hold out his goods in England as the same as those made by the former (u). And in *Aksionairnoye Obschestvo A. M. Luther v. Sagor & Co.*, [1921] 1 K. B. 456; 3 K. B. 532, C. A., where the Soviet Government confiscated the property of a company incorporated in Russia and sold it to a firm in England, upon the recognition of the Soviet Government as a *de facto* Government, it was held that the recognition was retrospective and that consequently the validity of the sale of the property to the defendants could not be impugned.

Transfer of
lien on
chattel
governed by
lex situs.

The decisions in the cases just cited do not in themselves go beyond the question of the validity of a transfer of the property in personal chattels; but cases may easily arise where the complete property in a chattel is not intended to pass, but a mere lien or possessory right conferred, and it would seem that the creation of such a lien is in like manner subject to the *lex loci rei sitæ*. In the case of *Harmer v. Bell (The Bold Buccleugh)* (x) it was held that the lien, which attaches by English law on a ship which causes damage by collision, travels with the vessel into whatever jurisdiction and into whosoever possession it may pass, and, when carried into effect by a proceeding *in rem*, relates back to the period when it first attached. The principle of this case, where the lien so created was held to prevail against a subsequent *bonâ fide* purchaser without notice, would logically demand the recognition of a lien created in another jurisdiction, and by a law different from that of the Court which was called upon to enforce it, but, as the collision happened in English waters, no conflict of law arose. In the much older case of *Inglis v. Usherwood* (1801), 1 East, 515, a lien created by Russian law on a chattel then within its jurisdiction which the English law would not have conferred, was recognised by the Court, but here again there was no real conflict of law, as the contract out of which the transaction arose was entered into by correspondence between merchants in London and St. Petersburg, and the vessel was chartered by the English consignee, so that the *lex loci*

Stoppage in
transitu.

(u) For other cases relating to the right to protect a trade mark, see *Collins Co. v. Brown* (1857), 3 K. & J. 423; *Collins Co. v. Reeves* (1858), 4 Jur. (N.S.) 865. And as to the right to protect a trade name, cf. *Société Anonyme des Anciens Etablissements Panhard et Levassor v. Panhard Levassor Motor Co.*, [1901] 2 Ch. 513.

(x) (1851), 7 Moo. P. C. 267. The dictum in *The Volant* (1842), 1 W. Rob. Adm. 387, that damage by collision gives no lien upon the ship in fault, is overruled.

contractus, as far at least as the rights of the Russian merchant who sought to enforce his lien were concerned, was the same as the *lex loci rei sitæ*. The plaintiff was the assignee of a bankrupt who had commissioned a Russian merchant to purchase certain goods for him and ship them on board a vessel of which the defendant was the captain, chartered by the bankrupt. The goods were shipped, but the shipper, hearing of the consignee's bankruptcy, exercised the right of lien given him by the Russian law under such circumstances, and the action was against the captain of the ship for delivering up the cargo to his order. Thus, whether the Russian law was accepted as conclusive because it was that of the place where the vendor had bound himself to perform his contract (*y*), or that of the place where the purchaser had concluded the contract by his agent (*z*), or for the reason just stated, that the goods were within its jurisdiction when it assumed to create the lien in question, was immaterial to the decision, which was, however, clearly put on the last-mentioned ground.

In the case *Re Queensland Mercantile Agency Co.; ex parte Australasian Investment Co.* (*a*), the doctrine of the *lex loci rei sitæ* was extended to an assignment, by legal process of arrestment, of debts or choses in action, being in fact unpaid calls due or becoming due from shareholders in the country where the arrestment was made.

It will be seen that none of the cases above cited as to the *lex loci rei sitæ* contemplates a conflict between that law and the *lex loci actus*. In all of them it is the fact, or it is presumed, that the chattel was, at the time of the disposition or alienation, within the jurisdiction where the alienation was made. The language of the judgments, therefore, not being directed to this distinction, cannot be relied upon as indicative of the rule. Thus, in one case it was said that the question of title "depended on transactions in England" (*b*); whilst in another the rule was laid down as being that "if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere" (*c*). It is submitted, however, that there can be little doubt that the latter more correctly expresses the true principle. If two persons meet in one

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(y) *Lebel v. Tucker* (1867), L. R. 3 Q. B. 77; *Trimbey v. Vignier* (1834), 1 Bing. N. C. 151.

(z) *Pattison v. Mills* (1828), 1 Dow. & Cl. 342; *Albion Insurance Co. v. Mills* (1828), 3 Wils. & S. 233.

(a) [1891] 1 Ch. 536; 60 L. J. Ch. 579. As to sale of a bill of exchange under judicial process, see *Alcock v. Smith*, [1892] 1 Ch. 238; cited above.

(b) *Williams v. Colonial Bank* (1890), 38 Ch. D. 388, 399, 403; affirmed H. L. May 12, 1890.

(c) *Cammell v. Sewell* (1858), 29 L. J. Ex. 350, 353.

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country, and execute documents or go through forms which profess to transfer the property in movables situate in another country, all that they can do in reality is to enter into a contract for the transfer of the property. The very fact that by the laws of some States the property in chattels cannot pass without delivery (*d*) shows that delivery is or may be an essential part of the transfer, and that the law of the place where the chattel actually is, being the only law which can physically control the chattel, must prevail over the law of the place where the contracting parties purport to act. The *effect* of the contract for transfer so entered into, as between the parties themselves, is of course a part of the law of contracts, and depends upon the principles applicable to that branch of the subject (*e*).

An apparent exception, though not a real one, to the rule above considered, may be noted in a modern decision that an assignment for the benefit of creditors, executed in the country where the assignor was domiciled, entitles the assignee to recover under it movables in the United Kingdom, although the provisions of an English statute requiring registration have not been complied with (*f*). The ground of the decision, however, was that on the true construction of the statute, the Legislature did not intend to include deeds executed by debtors who were not subject to the English bankruptcy laws; and the judgments amply recognise that the Legislature might have included such deeds, so far as English movables were concerned, if it had thought fit (*g*). Also a bill of sale, not requiring registration by the *lex situs* is regarded in England as capable of passing the property in the goods without registration (*h*).

Assignment
of choses in
action.

The considerations applicable to the assignment of transitory choses in action are necessarily different from those which relate to assignment of movables. In the first place, what is the *situs* of a right of action? It can be recovered in any *forum* which has jurisdiction over the debtor, whether by reason of domicile or transient presence, or because it is the court of the *locus solutionis* or *locus celebrationis* (*i*). It will often happen that there will be more than one *forum* in which it can be enforced at the same time, and not only can it be effectively recovered and realised wherever the debtor has property, but even in other countries

(*d*) See, e.g., *Liverpool Marine Credit Co. v. Hunter* (1867), L. R. 3 Ch. 479.

(*e*) See to this effect the language of Lord Hatherley (adopting an American decision) in *Simpson v. Fogo* (1860), 32 L. J. Ch. 249; citing *Thuret v. Jenkins*, 7 Martin (Am.) 353.

(*f*) *Dulaney v. Merry & Son*, [1901] 1 K. B. 536; decided on the construction of the Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57).

(*g*) Cf. *Cooke v. Charles Vogeler Co.*, [1901] App. Ca. 107.

(*h*) *Brookes v. Harrison* (1880), 6 L. R. Ir. 85.

(*i*) See *infra*, chap. viii.

which recognise the validity of a foreign judgment. Not even the actual presence of the debtor before the *forum* is in some cases necessary in order that the suit may be entertained. It seems manifest, therefore, that a *chose in action*—not connected with immovables or property of a local nature (*k*)—has in itself no locality (*l*); and though the *forum* of the defendant is sometimes regarded as the *situs* of the debt, because it is that to which the plaintiff ought *prima facie* to resort (*m*), yet it is only a metaphor to speak of its *situs* at all. It is true that, at the time when it is actually being enforced by suit, it can only be regarded as situate at the *forum* in which the suit is brought; but that consideration does not assist the solution of the question of its *situs* (if any) at the time of the assignment. Moreover, it is quite clear that the *forum* in which the suit is brought must decide all matters relating to the validity and effect of the assignment. The doubtful question is, whether such decision is to be guided by the law of the *forum* or by some other law.

There can be no doubt that, so far as questions of procedure and remedy are concerned, the *lex fori* is always entitled to speak for itself. According to Story, the English rule is that “the inquiry in whose name the suit is to be brought belongs not so much to the right and merit of the claim, as to the remedy.” It is manifest, however, that it cannot be always a matter of procedure and remedy only, whether an assignee can sue in his own name. It may easily happen that he cannot obtain the consent of the assignor to use his, and his right may thus be wholly defeated. The cases cited by Story on this subject are avowedly in conflict (*n*), and the true principle to look for seems to be, whether the contract was in its nature and inception assignable at all, and, if so, subject to what restrictions or limitations. Thus, in a case decided before *choses in action* were assignable at all by English law, the judges seem clearly to have been of opinion that the assignee of an Irish judgment, made assignable by an Irish statute, could sue in his own name in England (*o*). There seems, indeed, no reason why the *assignability* of a contract should be a matter for the *lex fori*, if the *negotiability* of a contract is not; and though there has been considerable conflict of opinion as to whether bills of exchange

(*k*) Story, § 383; *Robinson v. Bland* (1760), 2 Burr. 1077.

(*l*) For the principle by which a debt is considered as having a locality, see *Commissioner of Stamps v. Hope*, [1891] A. C. 476, P. C., at p. 481; and cf. also *Winans v. Att.-Gen.*, [1910] A. C. 27.

(*m*) *Hart v. Herwig*, L. R. 8 Ch. 860, 864.

(*n*) Story, *Confl.* § 565. See *Jeffery v. McTaggart* (1817), 6 M. & S. 126; *Wolff v. Osholme*, *ibid.* p. 99; *Smith v. Buchanan* (1800), 1 East, 11; *Alivon v. Furnival* (1834), 1 C. M. & R. 277; *infra*, chap. x.

(*o*) *O'Callaghan v. Thomond* (1810), 3 Taunt. 82. Cf. *Thompson v. Bell* (1854), 23 L. J. Q. B. 159.

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Alienation.*

Not for the
lex fori, but
usually for
the *lex*
contractus.

have been validly indorsed, the conflict has always been between the law of the place of acceptance and that of the place of indorsement. It has never been suggested in such cases that the sufficiency of the indorsement is to be decided by the *lex fori*, or that the question whether the indorsee must sue in the name of the drawer is merely matter of remedy and procedure (*p*).

It is therefore submitted with some confidence that the question whether a *chose in action* has been validly assigned is not usually one for the *lex fori* to decide. In deciding what the proper law to decide this question is, it must be borne in mind that *choses in action* are of different natures. The distinction between contract and tort is one which arises at the very outset of the subject. By what law the right to sue in damages for a tort may be validly assigned is a question which does not seem to have arisen. If the nature of the tort has nothing local about it, pointing to one *forum* rather than another (which will seldom be the case), it may be that the court in which it is sought to put the right of action in suit will have recourse to its own law to decide as to its assignability. But this is a mere academic question, of little importance as compared to the larger subject of the assignment of *choses in action* arising out of contracts. Assuming that this is not within the province of the *lex fori*, it follows almost necessarily that it must be for the *lex contractus*—the law, that is, which determines the nature and incidents of the obligation. The determination of this law will be found discussed at considerable length under the proper heading (*q*).

The English decisions on this branch of the subject are scanty. In *Lee v. Abdy* (1886), 17 Q. B. D. 309, the assignment sued on was an assignment in Cape Colony by a husband, there domiciled, to his wife of a policy in an English insurance company. The assignment was void by Cape law, on the ground that the assignor and the assignee were man and wife. It was held that the assignment was invalid, proceeding rather on the assumption that the question turned on the validity of the contract to assign, and that the parties were man and wife domiciled in Cape Colony. It is manifest that, as between husband and wife, the law of the matrimonial domicile has a much stronger claim to be heard than the *lex domicilii* in ordinary cases. The judgment of the other member of the Court (Wills, J.) was based upon the principle of the *lex contractus*,

(*p*) *Smallpage's Case* (1885), 30 Ch. D. 598; *Lebel v. Tucker* (1867), L. R. 3 Q. B. 77; *Trimbey v. Vignier* (1834), 1 Bing. N. C. 151; *Bradlaugh v. De Rin* (1868), L. R. 5 C. P. 473; *De la Chaumette v. Bank of England* (1831), 2 B. & Ad. 385; *infra*, chap. viii.; chap. x. Cf. judgment of Lord Campbell in *Thompson v. Bell* (1854), 23 L. J. Q. B. 159.

(*q*) *Infra*, chap. viii., "Contracts—Nature and Incidents of Obligation."

and the assignability of the contract in its inception. The reasonable view (the learned judge said) was that the insurance company had contracted with a person residing in South Africa, knowing that if the policy was assigned there, it would be assigned subject to, and would be governed by, the local law. So far as assignment of a *chose in action* under a judicial sale is concerned, the validity of such a sale has been recognised in the case of an English bill of exchange (*r*).

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It has sometimes been said that there is a close analogy between notice of an assignment of a *chose in action*, which some laws require to perfect it, and delivery of a corporeal tangible chattel. The analogy appears a little fanciful inasmuch as delivery gives possession, whilst notice of assignment only fulfils a direction imposed by the law it purports to follow. There appears no reason for distinguishing in this matter between formalities required at the time of assignment and formalities required after the assignment. English law, for example, requires that assignment of *choses in action* should be in writing, not by way of charge, and that written notice should be given to the debtor (*s*). It would seem strange to demand that this last requirement should be fulfilled in the case of an assignment abroad of the benefit of a foreign contract, sued on in England; and to admit at the same time that the assignability of the contract in other respects depended, not upon English law, but upon the law of the contract (*t*). It is submitted that the question of notice to the debtor, like other questions of assignability, must be determined by considering the original contract into which the debtor entered (*u*). Generally, any provision of the law of a foreign country requiring notice of assignment in order to perfect the title of the assignee will be recognised in England (*x*). But where an interest in English trust funds in the hands of trustees resident in England is assigned in a country whose law does not require notice to the trustees, and the assignee does not in fact give such notice, he

Notice of
assignment

(*r*) *Alcock v. Smith*, [1892] 1 Ch. 238. Cf. *Castrique v. Imrie* (1870), L. R. 4 H. L. 414. As to the validity of assignment of negotiable instruments, cf. also *Embiricos v. Anglo-Austrian Bank*, [1904] 2 K. B. 870; [1905] 1 K. B. 677, C. A.

(*s*) Jud. Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6).

(*t*) *O'Callaghan v. Thomond* (1810), 3 Taunt. 82; *Thompson v. Bell* (1854), 23 L. J. Q. B. 159.

(*u*) See on this subject *Sill v. Worswick* (1791), 1 H. Bl. 691; *Selkraig v. Davis* (1814), 2 Rose, 315.

(*x*) *Re Queensland Mercantile and Agency Co.; ex parte Australasian Investment Co.*, [1891] 1 Ch. 536, in which case the debenture was postponed as being an assignment without notice, the arrestment being an assignment with notice. Cf. *Inglis v. Robertson*, [1898] A. C. 616; *Kelly v. Selwyn*, [1905] 2 Ch. 117.

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Movables—
Alienation.

Movable
successions—
how far
governed by
lex domicilii.

But the
forum of the
domicil not
exclusively
entitled to
administer.

will be postponed to a subsequent assignee who does give notice (*y*).

(iii.) SUCCESSION TO MOVABLE PERSONAL PROPERTY.

(a) *Disposition of Movable Personal Property by Will*.—It has been very generally stated, as a maxim of private international law, that wills of movable personal property are in all cases governed by the *lex domicilii* of the testator (*z*); and the law was laid down by Lord Westbury in *Enohin v. Wylie*, in terms which have been since the subject of some criticism: "It is now put beyond all possibility of question that the administration of the estate of a deceased person belongs to the Court of the country where the deceased was domiciled at his death. All questions of testacy and intestacy belong to the judge of the domicil. To the Court of the domicil belongs the interpretation and construction of the will of the testator. To determine who are the next of kin or heirs of the personal estate of the testator is the prerogative of the judge of the domicil, and according to the most recent authorities, the question of the legitimacy of legatees or next of kin depends upon the same law (*a*). In short, the Court of the domicil is the *forum concursus*, to which the legatees under the will of a testator, or the parties entitled to distribution of the estate of an intestate, are required to resort" (*b*). But this language, so far as it asserts that the *forum* of the domicil is the Court *exclusively* entitled to administer the estate of a deceased testator or intestate, is now admittedly incorrect. On the contrary, whenever administration or probate has been obtained in England, the English Court will make a general decree for the administration of all the assets, wherever situate; the principle being that the executors, trustees, or administrators are personally subject to its jurisdiction, and should be controlled by it (*c*). And where no proceedings are in

(*y*) *Kelly v. Selwyn*, [1905] 2 Ch. 117, where an Englishman temporarily resident in New York executed an assignment to his wife of a reversionary interest in personality in England in the hands of trustees. The law of New York did not require notice to the trustees to perfect the title of the assignee. He afterwards executed in England a mortgage of the same property to the plaintiff. The latter gave notice to the trustees of his mortgage, before notice of the assignment was given. *Held*, that the mortgage had priority over the assignment. It may be added that it does not appear to be certain whether the judgment was given on the ground that the trustees were resident in England, or on the ground that the fund was an English trust fund.

(*z*) *Potter v. Brown* (1804), 5 East, 130; *Sill v. Worswick* (1791), 1 H. Bl. 690; *Price v. Dewhurst* (1837), 4 My. & Cr. 76; *De Bonneval v. De Bonneval* (1838), 1 Curt. 856; *Dolphin v. Robins* (1859), 1 Sw. & Tr. 37; *De Zichy Ferraris v. Hertford* (1843), 3 Curt. 468; *Enohin v. Wylie* (1862), 10 H. L. C. 1.

(*a*) *Goodman's Trusts* (1881), 17 Ch. D. 266; *Andros v. Andros* (1883), 24 Ch. D. 637.

(*b*) See also *Preston v. Melville* (1840), 8 Cl. & F. 1; *Doglioni v. Crispin* (1866), L. R. 1 H. L. 301.

(*c*) *Ewing v. Orr-Ewing* (1883), 9 App. Cas. 34, 41; 10 App. Cas. 453; *John-*

fact pending in the *forum* of the domicile, it appears from the *Orr-Ewing Case* that the English Court has no discretion to refuse the general relief; though it is often more convenient and proper that the trusts—e.g., of Scotch property held by Scotch trustees—should be administered by a Scotch rather than by an English Court; and leave to serve an English writ abroad has been refused in such a case (*d*). And it was pointed out in the *Orr-Ewing Case* that if English trustees, having in their hands English trust funds, were found within the jurisdiction of the Scottish Courts, those Courts, upon the same principle, might compel them to do their duty (*e*). The proposition, therefore, that only the Courts of that country in which a testator dies domiciled can administer his personal estate, is incorrect (*f*).

It is, however, in all cases the *lex domicilii* which should determine the right of succession. The rule has been recently stated to be, that although the parties claiming to be entitled to the estate of a deceased person may not be bound to resort to the tribunals of the country in which the deceased was domiciled, and although the Courts of this country may be called upon to administer the estate of a deceased person domiciled abroad, and in such case may be bound to ascertain, as best they can, who, according to the law of the domicile, are entitled to that estate; yet, where the title has been adjudicated upon by the Courts of the domicile, such adjudication is binding upon, and must be followed by, the Courts of this country (*g*). Moreover, it would appear to be only for the purpose of determining the right of succession that the *lex domicilii* can be invoked. “So far as relates to domicile, it has always appeared to me to be clear that the domicile of a deceased testator or intestate cannot in principle furnish any governing or necessary rule, except for the purpose of determining the succession to movable estate. For that purpose recourse must be had, not always or necessarily to the Courts, but always and necessarily to the law, of the domicile. The succession being once ascertained, the rights resulting therefrom belong to, and follow the person of, the living successor, and not the dead predecessor” (*h*).

In *In re Cunningham; Healing v. Webb*, [1924] 1 Ch. 69; 130

stone v. Beattie (1843), 10 Cl. & F. 42, 84; *Stirling Maxwell v. Cartwright* (1879), 11 Ch. D. 523.

(*d*) *Cresswell v. Parker* (1879), 11 Ch. D. 601.

(*e*) *Ferguson v. Douglas*, 3 Pat. App. Cas. (Sc.) 503, 510.

(*f*) Per Lord Selborne in *Ewing v. Orr-Ewing* (1883), 9 App. Cas. 34, 39; commenting on *Enohin v. Wylie* (1862), 10 H. L. C. 1. See Dicey, *Conflict of Laws* (1922), pp. 867—8, for a note on the *Orr-Ewing Case*.

(*g*) *In re Trufort, Trafford v. Blanc* (1887), 36 Ch. D. 600, 611. As to judgment obtained by default, mistake or fraud, *vide infra*, chap. ix.

(*h*) Per Lord Selborne, C., in *Ewing v. Orr-Ewing* (1883), 10 App. Cas. (Sc.) 453, 502.

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L. T. 308. the testator, who died domiciled in France, made his will in English form directing the sole executor, who was English, to divide the residue of his estate equally between ten named legatees and if any of such legatees died in his lifetime the legacy was to go to the issue of such legatee. Two of the residuary legatees died in his lifetime without issue. By English law there would be a lapse of these two shares, but by French law the eight surviving legatees would take the whole residuary estate. It was held by Eve, J., that the domicile being French, and there being no sufficient indication in the will, either express or implied, that the testator desired it to be construed by English law, the *primâ facie* general rule applied, and the will must be construed by French law. Consequently there was no lapse of the two tenth shares, and the whole residue went to the eight surviving legatees.

The *lex domicilii*, however, applies only to cases where there is a *succession*, either by will, heirship, or kindred, to the goods of the deceased. And where the deceased was a bastard without heirs, dying intestate, it was held that a fund to which he was entitled in England went to the English Crown *bona vacantia*, to the exclusion of the State to which by nationality and domicile the deceased belonged (i).

The *lex domicilii* spoken of in the cases just discussed is of course the law of the testator's (or intestate's) domicile at the time of his death, not at the time the will was made (k). According to the continental view, the validity of a will is tested either by the law of the domicile or by the law of the place where it was made, following the maxim "*locus regit actum*"; and a change of domicile after execution of the will and before death is, therefore, immaterial. In an English Court the question would assume a different aspect. If the domicile of the testator at the time of his death was foreign, it is submitted as clear that the law of that domicile would be followed as to the validity of the will; and if that law recognised as valid a will made either in accordance with the law of a former domicile, or with the law of the place of execution, the above authorities point to the acceptance by the English Court of that decision. But if the domicile of the testator at the time of death is English, and the

Change of
domicil—
effect of.

(i) *Barnett's Trusts*, [1902] 1 Ch. 847. The cases there cited (*Re Beggia* (1822), 1 Add. 340, and *Aspinwall v. Queen's Proctor* (1839), 2 Curt. 241) appear to have little if any application to the principle.

(k) *Enohin v. Wylie* (1862), 10 H. L. C. 1; *Bremer v. Freeman* (1857), 10 Moo. P. C. 312; *Collier v. Rivaz* (1841), 2 Curt. 855. Cf. also *Re Bowes*; *Bates v. Wengel* (1906), 22 T. L. R. 711, which was, however, decided on the supposition that French law recognised only a legal domicile. But the correctness of this supposition is doubtful in view of the cases *Collier v. Rivaz* and *Hamilton v. Dallas* (*supra*, pp. 95-6), in which it was found that French law recognised a *domicile de fait*, in contradistinction to a *domicil légal*.

will is not in accordance with English law, it would clearly be invalid, apart from statutory provisions (l).

It is now, however, unnecessary to consider whether a testator, being a British subject, has changed his domicile since making his will, since, as regards British subjects, it was enacted by Lord Kingsdown's Act (24 & 25 Vict. c. 114), first, that any will of personal estate (*m*) made out of the United Kingdom by a British subject, wherever domiciled at the time of making or of death, should be admitted to probate as valid, if it was executed in compliance with the forms prescribed either by the *lex loci actus*, the *lex domicilii* at the time of its execution, or the *lex domicilii originis* of the testator. Secondly, that any will of personal estate made within the United Kingdom by a British subject, whatever his domicile at either time, should be admitted to probate as valid, if it was executed in compliance with the forms required by the laws for the time being in force in that part of the kingdom where it was made (s. 2). And, thirdly, that no will or other testamentary instrument should be held to be revoked or to have become invalid, nor should the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same (s. 3). But in *Cottrell v. Cottrell* (1885), L. R. 2 P. & D. 400, it was held that a will and revocation, executed according to the testator's domicile at the time of his death, revokes altogether a will made under a former English domicile, with the appointment of executors contained in it, if the intention that it should have that effect is apparent. This last section is not in terms confined to the wills of British subjects, but, having regard to the title of the Act ("An Act to amend the law with respect to wills of personal estate made by *British subjects*"), it is difficult to see how it could be extended to the wills of foreigners who should have acquired a British domicile between the time of making their will and that of their death (*n*). Assuming that the section cannot be so extended, the validity of such a will would have to be decided upon its compliance or non-compliance with the requirements of English law, and the fact that it was valid by the law of the testator's domicile at the time of making would be

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c. 114.

(l) *Re Reid* (1866), L. R. 1 P. & D. 74; *Re Rippon* (1863), 32 L. J. P. & M. 141.

(m) "Personal estate." It may be suggested that this statute was not intended to extend to English *leaseholds*, which are immovables and subject to the *lex situs* for most other purposes. (See pp. 240 *seq.*) But in construing an English statute it seems almost impossible to give the words "personal estate" any meaning narrower than that ordinarily attributed to them by English law. It would follow that in cases falling within Lord Kingsdown's Act, the *lex situs* with respect to leaseholds may be satisfied without the formalities required for the devise of English land by the Wills Act. The statute will be found set out as an appendix to the present chapter.

(n) See *Re Von Buseck* (1881), 6 P. D. 211; and *infra*.

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immaterial. With regard to the alternative tests of validity offered by the first two sections, it was decided by Lord Penzance in *Pechell v. Hilderley* (1869), L. R. 1 P. & D. 673, that only one can be adopted in each case, and that it is not competent for those who seek to set up a testamentary paper to endeavour to secure the advantages of two conflicting jurisdictions. The privileges conferred by the Act attach to British subjects by naturalization (under 7 & 8 Vict. c. 66) as if they had been so by birth (*o*). But the provision in the Naturalization Act, 1870 (33 Vict. c. 14), s. 2, enacting that real and personal property may be “taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject,” has been held not to confer upon aliens the privileges as to making wills which are given to British subjects by Lord Kingsdown’s Act (*p*). In the case just cited it was said by Lord Selborne, that though the words “disposed of” in the Naturalization Act must include a disposition by will, yet in determining what is a valid will of an alien, the general principles of law already laid down must still be applied. As to the possible effect of marriage in England after the acquisition of an English domicile upon the validity of a will previously made, having regard to the provisions of the 3rd section, see *Re Reid* (*q*). And where the testator, being a naturalized Englishman, whose domicile was not ascertained, but appeared to be French, made in France a will and codicils in English form, and a holograph will confirming them in French form, it was held that all were valid under s. 1 of the Act, it being proved that the French law permitted foreigners in France to make their will according to the forms required by the law of their nationality; so that the French will was good directly, and the English will and codicils indirectly, by the *lex loci actus* (*r*).

The exceptional case has arisen of a British subject dying domiciled in Baden, the Courts of which State, according to the admitted statements in the case, regarded all questions of distribution on intestacy as governed by the law of the country of which the deceased was a subject (*s*). The English Court, being called upon to distribute movable property of the deceased, was thus referred by the *lex domicilii* back upon itself; and when

(*o*) *Re Gally* (1876), L. R. 1 P. D. 438.

(*p*) *Bloxam v. Favre* (1883), 9 P. D. 130. See, to the same effect, *In the Goods of Von Buseck* (1881), 6 P. D. 211. See s. 17 of the Nationality Act, 1914, p. 53, *supra*.

(*q*) (1866), L. R. 1 P. & D. 74.

(*r*) *Re Lacroix* (1877), L. R. 2 P. D. 95.

(*s*) *Re Johnson, Roberts v. Attorney-General*, [1903] 1 Ch. 821. It will be noted that Farwell, J., calls attention to the fact that the Master’s finding as to the Baden law was not appealed from. It may be doubted whether it was correctly or sufficiently stated.

referred back to itself, would according to the ordinary rule look to the *lex domicilii*. Farwell, J., said that it was impossible to treat this as a *circulus inextricabilis*, and adopted the law of the domicil of origin of the deceased (which happened to be Maltese), on the ground that the acquired domicil in Baden, being ineffectual to create any rights or liabilities governing the distribution of movables, was for this purpose no domicil at all.

The general rule that the law of the domicil governs testamentary dispositions of personalty applies to *capacity*, and there can be little doubt that, whatever may be the claims of the *lex loci* with reference to capacity to do an act or enter into a contract within its jurisdiction (*t*), the right of the *lex domicilii* is indisputable when the capacity to make a will is in question (*u*). The capacity of a legatee to take under a will is similarly referred to the *lex domicilii*, but in this case it is the law of the domicil of the legatee, not of the testator, which determines the question (*x*). On the other hand, the legitimacy of the legatee depends upon the *lex domicilii* of the testator, the question usually being as to the proper meaning of the word "child" or "son" in the will (*y*).

With regard to *forms* and *solemnities*, the question of the proper law by which wills of personalty should be tested was for some time left undecided, it having been thought at one period that there was a difference between the will of an English subject domiciled abroad and that of a foreigner similarly situated; and it was held in several cases that compliance with the English forms by an English subject was sufficient (*z*) and necessary (*a*). But this distinction was exploded, and the principle of referring to the decision of the *lex domicilii*, and of the *lex domicilii* alone, firmly established by subsequent decisions (*b*). The alteration made in the English law on this subject by Lord Kingsdown's Act (24 & 25 Vict. c. 114) has been already pointed out.

Further, by the law of the testator's domicil is meant not only the law of his domicil at the time of his death, but *the law at the time of his death* of his domicil at the time of his death. In *Lynch v. Provisional Government of Paraguay* (1871), L. R. 2 P. & D. 268, a domiciled Paraguayan died in Paraguay, leaving

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Capacity of
testator—
depends on
lex domicilii.

Forms of
wills of
movables.

Change of
lex domicilii
after death.

(*t*) As to the question of capacity for these purposes, see *ante*, chap. iii.

(*u*) Story, Conf., § 103; Westlake, Priv. Int. Law (1922), § 85; *Enohin v. Wylie* (1862), 10 H. L. C. 13; *Doglioni v. Crispin* (1866), L. R. 1 H. L. 301; *Ewing v. Orr-Ewing* (1883), 10 App. Cas. 453, 502.

(*x*) *In re Hellman's Will* (1866), L. R. 2 Eq. 363.

(*y*) *Andros v. Andros* (1883), 24 Ch. D. 637; *Goddman's Trusts* (1881), 17 Ch. D. 266.

(*z*) *Duchess of Kingston's Case* (1776), cited 2 Addams, 21.

(*a*) *Curling v. Thornton* (1823), 2 Addams, 21.

(*b*) *Stanley v. Bernes* (1830), 3 Hagg. Eccl. 373; *Moore v. Darell* (1832), 4 Hagg. Eccl. 346; *Price v. Dewhurst* (1837), 4 My. & Cr. 76; *De Zichy Ferraris v. Hertford* (1843), 4 Moo. P. C. 339; *Laneville v. Anderson* (1862), 2 Sw. & Tr. 24.

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personal property in England. After his death all his property wherever situate became by a change in Paraguayan law the property of the nation of Paraguay, and his will became by the same law absolutely invalid. It was held, however, that the legatee under the will of the property in England was entitled to probate here notwithstanding, and that no retrospective operation could be attributed to the Paraguayan decree. "The question is," said Lord Penzance, "in what sense does the English law adopt the law of the domicile? Does it adopt the law of the domicile as it stands at the time of the death, or does it undertake to adopt and give effect to all retrospective changes that the legislative authority of the foreign country may make in that law? No authority has been cited for this latter proposition, and in principle it appears both inconvenient and unjust. Inconvenient, for letters of administration or probate might be granted in this country which this Court might afterwards be called upon, in conformity with the change of law in the foreign country, to revoke. Unjust, because those entitled to the succession might, before any change, have acted directly or indirectly upon the existing state of things, and find their interests seriously compromised by the altered law. As, therefore, I can find no warrant in authority or principle for a more extended proposition, I must hold myself limited to the adoption and application of this proposition, that the law of the place of domicile as it existed at the time of the death ought to regulate the succession to the deceased in this case." This case was followed and approved by Romer, J., in 1895, the question having arisen by reason of the substitution of Italian law for Austrian in Padua in 1871 (c).

The rule which refers all questions of the validity of a will to the law of the testator's domicile applies not only to the formal requisites of execution, but to all objections which could be raised in the Court of the domicile. Where the will of the testatrix had been duly proved in Jersey, where she was domiciled, it was not allowed to be impeached in the Court of Probate here on the ground that the testatrix was of unsound mind or that it was obtained by undue influence (d).

Testamentary Execution of Powers.

The question of the validity of testamentary instruments, purporting to be made in execution of powers created by English wills or settlements, has often arisen. The following propositions appear now to be established. Firstly, a simple testamentary

(c) *Re Aganoor's Trusts*, [1895] 64 L. J. Ch. 521.(d) *Miller v. James* (1872), L. R. 3 P. & D. 4.

power is taken to be well executed by a will made in conformity with the *lex domicilii* of the donee of the power (e); and this is so, whether the power be general or special (f). Secondly, when the instrument creating the power requires specified formalities for its due execution, compliance with the *lex domicilii* is not sufficient, unless these formalities have also been observed (g). Thirdly, a will that complies with the formalities required by the instrument creating the power is a good execution of the power, though not made in accordance with the *lex domicilii* of the testator, and as such, will be admitted to probate (h). It will be observed that the third of these propositions is an extension of the second; and reference to the authorities cited will show that on principle it has not escaped criticism. The history of the first proposition, that a power not requiring special formalities is well executed by a will complying with the forms of the *lex domicilii*, is as follows. In *D'Huart v. Harkness* (i) it was so decided; and the authority of the decision was expressly recognised by the recent decision of Stirling, J., in *Re Price; Tomlin v. Latter* (1900) (i). In the earlier of these cases the will had been admitted to probate; and in the latter, letters of administration with the will annexed had been granted; but there is no apparent reason for saying that formal recognition of the will in the Probate Court is a condition precedent to its recognition as a due execution of the power; and the reasoning of Lord Romilly in the case of *D'Huart v. Harkness* seems to show that it is sufficient if it appears that the will is entitled to probate here.

The question whether the power has been validly exercised or not cannot be determined by evidence which is not admissible by English law, notwithstanding that such evidence would have been accepted by the testator's *lex domicilii*. In *Re Scholefield, Scholefield v. St. John* (k) the will in question was valid by the *lex domicilii* (French law) and satisfied the conditions of the power, but did not refer to the property comprised in the power. There were certain documents referring to the power which

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(e) *In re Price; Tomlin v. Latter*, [1900] 1 Ch. 442; following on this point *D'Huart v. Harkness* (1864), 34 Beav. 324. Cf. *Tatnall v. Hankey* (1838), 2 Moo. P. C. 342. In *Re Walker, MacColl v. Bruce*, [1908] 1 Ch. 560, a codicil valid by the *lex domicilii* of the testator, but not in accordance with the terms of the power, was added in favour of sons of the testator; for there was no need (as in *Re Kirwan's Trusts* (1883), 25 Ch. D. 373) to rely on the Wills Act, 1861.

(f) *Pouey v. Hordern*, [1900] 1 Ch. 492; 69 L. J. Ch. 231.

(g) *Barretto v. Young*, [1900] 2 Ch. 339; *Hummel v. Hummel*, [1898] 1 Ch. 642.

(h) *Re Huber*, [1896] P. 209; *Re Halliburton* (1860), L. R. 1 P. & D. 90; *Re Alexander* (1860), 29 L. J. P. M. 93.

(i) See note (e) above.

(k) [1905] 2 Ch. 408. The case was compromised on appeal, [1907] 1 Ch. 664, C. A.

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ment.

French law admitted as evidence of intention to deal with the said property. It was held that the validity of the will was determined by French law, and the said documents were merely evidence whose admissibility was determined by English law (the *lex fori*).

In cases, however, where a will, valid by the *lex domicilii* but not complying with the formalities of English law, is relied on as an execution of an English power of appointment, the will must either expressly or impliedly purport to execute the power in question. When an English will is in question, it is enacted by s. 27 of the Wills Act, 1837, that a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate which he may have power to appoint, and shall operate as an execution of such power unless a contrary intention shall appear by the will. But this section is a rule of construction applicable to wills which have to be construed by English law, and not to wills which have to be construed by the *lex domicilii* of a foreign testator. A general bequest, therefore, of personal estate in such a will, there being no reference in the will either to the power or to the property to be appointed, will not be construed by English Courts as an execution of the power, unless the intention to introduce the English rule of construction on this appears from the will itself (*l*). But if the will contains anything to indicate that the testator wrote it with reference to the law of England, this is sufficient. Thus, where a testatrix in a French will said, “And I declare that this will annuls all the others, and that it shall thus be considered in England as well as in France,” it was held that this amounted to a declaration that she meant the will to operate as her last will in England as well as in France, that the rule of construction contained in s. 27 of the Wills Act applied, and that consequently a general bequest of personal estate in the will operated as a good execution of a power of appointment given to the testatrix by an English instrument (*m*).

Wills valid
by the law of
the domicil.

A distinction has been drawn in *Re Kirwan's Trusts* (1883), 25 Ch. D. 373, between wills valid by the law of the domicil, and wills owing their validity to Lord Kingsdown's Act (24 & 25 Vict. c. 114), to which it is necessary to call attention. In that case, decided in 1883, Kay, J., held that a will executed by an English subject in France according to French law (which was the law of the testator's domicil) was not a good execution of an English testamentary special power requiring attestation by two

(*l*) *In re D'Este; Poulter v. D'Este*, [1903] 1 Ch. 898.

(*m*) *In re Price; Tomlin v. Latter*, [1900] 1 Ch. 442.

witnesses. It cannot be doubted, after recent decisions (*n*), that the alleged will was a bad execution of the power, on the short ground that the special formalities required were wanting; but some of the language used by the learned judge indicates that a will valid only under Lord Kingsdown's Act (*o*), though made in accordance with the law of the domicile of the testator, is not a good execution of a testamentary power. It would appear on principle that if the will in question was valid according to the law of the domicile (as it was in fact) this alone would have made it a good execution of the power, but for the fact that special formalities were required by the instrument creating the power. Unfortunately, however, *D'Huart v. Harkness* (*p*) was not cited before Kay, J., during the argument of *Re Kirwan's Trusts*; and the learned judge relied upon the provision in s. 10 of the Wills Act, 1837, that no testamentary appointment under a power should be valid unless attested by two witnesses. This part of the decision, however, was not necessary to support the judgment; and the true principle appears to be as stated by Stirling, J., in *In re Price* (*q*), after a careful examination of the preceding cases, namely, that where the domicile of a testator is foreign, the Wills Act does not apply at all, and that there is no more reason for such a testator being bound by the tenth section than by the ninth (*r*).

There is, however, a class of wills made valid by Lord Kingsdown's Act (*s*) which would not be valid according to this general principle, and must depend solely upon the statute. This class includes (1) wills made according to the law of the place where they were made in fact, such place not being the domicile of the testator as it was in *D'Huart v. Harkness*; (2) wills made according to the law of the domicile of the testator at the time of making, but not at the time of his death; (3) wills made in accordance with the law of the domicile of origin of the testator in British Dominions, in cases where another domicile had been acquired before the death. To this class of wills the *dicta* of

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Wills valid
by the
Wills Act,
1861.

(*n*) *Barretto v. Young*, [1900] 2 Ch. 339; *Hummel v. Hummel*, [1898] 1 Ch. 642.

(*o*) 24 & 25 Vict. c. 114.

(*p*) (1865) 34 Beav. 324.

(*q*) *In re Price; Tomlin v. Latter*, [1900] 1 Ch. 442.

(*r*) Cf. *Re Walker, MacColl v. Bruce*, [1908] 1 Ch. 560.

(*s*) 24 & 25 Vict. c. 114, s. 1: "Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of her Majesty's dominions where he had his domicile of origin."

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Kay, J., in *Re Kirwan's Trusts* would seem to apply—namely, that they are not made by Lord Kingsdown's Act, and therefore are not by English law, good executions of English testamentary powers. The decision of Kekewich, J., in *Hummel v. Hummel*, [1898] 1 Ch. 642, is actually to this effect. In that case the testatrix made a will in France, and died there. The matrimonial domicile of the testator was Austrian, and it did not appear that any French domicile had been acquired. The reasoning of the judgment appears to assume that the testatrix was a British subject, and that her domicile was not French; and it was held that the will was not a valid execution of an English power of appointment. This decision seems to be approved by Stirling, J., in his judgment in *In re Price*.

Where
specified
formalities
required.

The second proposition as to the execution of powers stated above, viz., that where the instrument creating the power requires its execution with special formalities, these formalities must be complied with, whatever the law of the testator's domicile, appears to be implied in the language of Stirling, J., in *In re Price*, when that learned judge was indicating the grounds on which the decision in *Re Kirwan's Trusts* might properly be supported. In *Barretto v. Young*, [1900] 2 Ch. 339, the same principle was followed by Byrne, J., in dealing with the case of a will made by a domiciled Frenchwoman, valid by the *lex domicilii*, but not complying with the requirements as to attestation specified by the will which created the power. It should be mentioned that the judgment expressly observed that the testatrix (the donee of the power) was a foreigner (*i.e.* by nationality as well as domicile); but it is submitted that this was really immaterial. Had the nationality of the testatrix been British, Lord Kingsdown's Act would not have aided the will as an execution of the power, according to the cases cited on the preceding pages; and, if the domicile had been English as well, there would have been still less ground for contending that the prescribed formalities could be dispensed with. From *Re Walker; MacColl v. Bruce*, [1908] 1 Ch. 560, however, it may be concluded that where the document creating the power requires special formalities which have not been fulfilled, the Court will aid the defective execution in favour of children of the appointor. In this case the codicil was valid by the testator's *lex domicilii*, but was not in conformity with the terms of the power; there was no necessity, as in *Re Kirwan's Trusts*, to rely on Lord Kingsdown's Act (*t*).

The third and last of the propositions stated above is that a will is a good execution of a power, if it complies with the

(t) Cf. *In re Baker's Settlement Trusts*, *Hunt v. Baker*, [1908] 1 Ch. 560.

formalities prescribed by the instrument creating it, though not with the *lex domicilii* of the testator. This appears to have been first suggested in *Tatnall v. Hankey* (u), where the will of the testatrix, whose domicil was Italian, was not duly made and attested according to the Neapolitan law. It was held that it was nevertheless entitled to probate as a good execution of a power of appointment created by an English will, the formalities prescribed by that will having been complied with. In *Re Alexander* (x), Sir Cresswell Cresswell considered himself bound to follow this decision, and held a will entitled to probate under the same circumstances, though he had previously expressed a directly contrary opinion in *Crookenden v. Fuller*, decided in the same year. The same question came before Lord Penzance in 1860 (y) with reference to a will made in Scotland in the English form by a married woman domiciled in Scotland, purporting to be made under a power and disposing of property in England, and not valid by the law of Scotland; and Lord Penzance held it to be a good execution of the power, following the previous decisions, though with expressed reluctance. It may be noted that in this case it did not appear that any formalities were prescribed by the instrument creating the power, and it seems fairly clear that the formalities relied on were those provided by the Wills Act, 1837 (1 Vict. c. 26), s. 10. The decision, therefore, seems to go further than the previous cases, and amounts to saying that a will invalid by the *lex domicilii* may be a good testamentary appointment under a power created by an English instrument relating to property in England, if the formalities required by English law are observed. *Re Huber*, [1896] P. 209, was decided by Sir F. Jeune to the same effect. The domicil in this case was French, and the power was created by a deed executed in the course of an English administration suit with reference to English Property. It did not appear that any formalities were required by the language of the deed; and the distinction (whatever it be worth) between formalities required by the instrument creating the power and formalities required by the law of the country where the property is situated and probate is asked for, was not adverted to. The will was executed in English form, and not in accordance with French law. It was held that it was a good execution of the power, the

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(u) *Tatnall v. Hankey* (1838), 2 Moo. P. C. 342. Cf. *Barnes v. Vincent* (1846), 5 Moo. P. C. 201.

(x) *Re Alexander* (1859), 29 L. J. P. & M. 93. *Crookenden v. Fuller*, *ibid.*, p. 1.

(y) *Re Halliburton* (1860), L. R. 1 P. & D. 90; followed in *Re Tréfond*, [1899] P. 247, and *Re Vannin*, [1901] P. 330. In the last case Sir F. Jeune said that the proper course in such cases was to grant administration with the will annexed, and not to make a grant of probate.

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Operation of
power—to
be controlled
by creating
instrument.

learned judge relying on the cases already cited, and also on some *dicta* of Lord Romilly in *D'Huart v. Harkness* (1864), 34 Beav. 324, with reference to *Re Alexander* (z). Sir F. Jeune evidently regarded himself as bound by authority, and said that the law on the question could not be regarded as being in a satisfactory condition.

In cases of conflict between the *lex domicilii* of the donee of the power, and the law to which the donor of the power presumably intended to refer, not as to formalities, but as to the operation of the power itself, it would seem on principle that the latter should prevail. The authority to dispose proceeds from the donor, not the donee. Thus it has been held that a power created by a marriage settlement in English form of English movables, executed on the marriage of an Englishwoman with a domiciled Frenchman, might be exercised by her in a manner which was not allowed by French law, though her domicile had become French by the marriage (a). So where a domiciled Englishman exercises by will a general power of appointment created by a Scotch will, the appointed property does not thereby become assets for his creditors, but is controlled by Scotch law (b). The distinction is between property and power; and in *Pouey v. Hordern* it is pointed out that if circumstances subsequent to the creation of the power took the property out of the instrument creating the power, and made it property of the appointor, different considerations would apply.

Where a will was made in English form by the wife of a domiciled Frenchman, which will was invalid as not being in accordance with the *lex domicilii*, but effectual by English law as a testamentary appointment under her marriage settlement, the Court, in *Re Tréfond*, [1899] P. 247, granted administration *testamento annexo* to the appointee, but limited it to such property as the deceased had power to and did dispose of by such testamentary appointment.

Construc-
tion of wills
of movables
—legiti-
macy of
legatee not
a matter
of construc-
tion,

As to the *interpretation* and *construction* of wills of personal estate, there is no doubt but that the law of the domicile speaks alone (c), unless there is sufficient on the face of the will to show a different intention in the testator, and this not only in the

(z) (1859), 29 L. J. P. & M. 93.

(a) *In re Megret, Tweedie v. Maunder*, [1901] 1 Ch. 547; following *Pouey v. Hordern*, [1900] 1 Ch. 492. Cf. *In re Hernando* (1884), 27 Ch. D. 284. Cf. *Re Pryce, Lawford v. Pryce*, [1911] 2 Ch. 286, C. A., which involved the exercise of a power of appointment in a will by a married woman who had acquired a Dutch domicile.

(b) *In re Bald* (1897), 66 L. J. Ch. 524.

(c) *Yates v. Thomson* (1835), 3 Cl. & F. 544; *Enohin v. Wylie* (1862), 10 H. L. C. 1; *Anstruther v. Chalmers* (1826), 2 Sim. 1. Cf. *Re Scholefield, Scholefield v. St. John*, [1905] 2 Ch. 408.

forum domicilii, but wherever such questions arise (*d*). In *Enohin v. Wylie* (1862), 10 H. L. C. 13, Lord Westbury says: "All questions of testacy and intestacy belong to the judge of the domicile. To the Court of the domicile belongs the interpretation and construction of the will of the testator." Thus, in *Anstruther v. Chalmers* (*e*), a Scotch lady died domiciled in England, having made a will in the Scotch form whilst on a visit to Scotland. The universal legatee having died in the lifetime of the testatrix, his representative became entitled by Scotch law. It was held, however, that the law of England must govern the construction, and that the gift consequently lapsed. Similarly, technical expressions or words of quantity or value in a will are to be interpreted as they would be in the Courts of the testator's domicile. The cases on this part of the subject are fully discussed in Story, and it is unnecessary to do more than refer to them here (*f*).

But although the interpretation of words in a will is governed by the law of the domicile of the testator, yet it is now conclusively established that the meaning of the word "child" in a will, *i.e.* the legitimacy of a descendant, is not a matter of interpretation at all. Accordingly, the legitimacy of a legatee, like his capacity (*g*), is referred to the personal law of the legatee, that is, to the law of his domicile, and not to the law of the domicile of the testator (*h*). The decision of the Court of Appeal in *Re Goodman's Trusts*, just cited, was emphatically marking an epoch in the history of this branch of the subject, inasmuch as it had been previously held by Lord Hatherley that the legitimacy of the legatee depended upon the law of the testator's domicile, not upon the law of his own, and the decision was expressly put by that learned judge upon the ground that it belonged to the law of the testator's domicile to interpret the

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but referred
to the law
of legatee's
domicil.

(*d*) *Trotter v. Trotter* (1829), 4 Bligh, N. S. 502; 3 Wils. & S. 407. *In re Price; Tomlin v. Latter*, [1900] 1 Ch. 442, where the testatrix declared that her will "annuls all the others . . . and that it shall thus be considered in England the same as in France." In this case, Stirling, J., said: "In general a will is to be construed according to the law of the domicile of the testator; but this is a mere canon of construction, which should not be adhered to when there is any reason, from the nature of the will, or otherwise, to suppose that the testator wrote it with reference to the law of some other country."

(*e*) (1826), 2 Sim. 1; see *Yates v. Thomson* (1835), 3 Cl. & F. 544, 569; *Ommaney v. Bingham* (1796), 3 Hagg. Eccl. 414, n.

(*f*) Story, Conf., § 479 (a), (b); *Pierson v. Garnett* (1786), 2 Bro. Ch. 38; *Malcolm v. Martin* (1790), 3 Bro. Ch. 50; *Saunders v. Drake* (1742), 2 Atk. 465; *Wallis v. Brightwell* (1722), 2 P. Wms. 88; *Lansdowne v. Lansdowne* (1820), 2 Bligh, 60; *Laneville v. Anderson* (1862), 2 Sw. & Tr. 24; *Stewart v. Garnett* (1830), 3 Sim. 398. As to the practice of the Court of Chancery in ignoring the rate of exchange, see *Cockerell v. Barber* (1810), 16 Ves. 461; *Campbell v. Graham* (1831), 1 Russ. & My. 453.

(*g*) *Re Hellman's Will* (1866), L. R. 2 Eq. 363.

(*h*) *Re Goodman's Trusts* (1881), 17 Ch. D. 266; 50 L. J. Ch. 425; overruling *Boyes v. Bedale* (1863), 1 H. & M. 798; and approving *Skottowe v. Young* (1871), L. R. 11 Eq. 474, and *Re Wright's Trusts* (1856), 25 L. J. Ch. 621.

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meaning of the word “child” in his will. In one sense it is true that the law of the testator’s domicile has the right to interpret the meaning of the word “child” in his will. “But the question,” said James, L.J., “is, what is the rule which the English law [the law of the testator’s domicile] adopts and applies to a non-English child? This is a question of international comity and international law. According to that law . . . the status of a person, his legitimacy or illegitimacy, is to be determined everywhere by the law of the country of his origin—the law under which he was born.” The decision of Lord Hatherley was declared in the same case to be contrary to principle, and erroneous. *Boyes v. Bedale* must therefore be regarded as no longer law. It must be noted that *Re Goodman’s Trusts* was a case, not of a will (like *Boyes v. Bedale*), but of intestacy; but it is clear from the judgments and on principle that cases of intestacy and testacy are governed by the same rule. The legitimacy of legatees, as well as of next of kin, is referred by English law to the law of their domicile, that is, to the law of the domicile of their father at the time of their birth (i). It has been seen above (chap. iv.) that, in cases of legitimisation *per subsequens matrimonium*, the legitimisation must be recognised by the law of the father’s domicile at the time of birth and at the time of the subsequent marriage (k).

But a bequest to the “next of kin” of a deceased legatee has been construed according to English law, so as to admit a half-sister who would have been excluded by the law of the domicile of the deceased legatee (l). The judgment proceeded on the ground that the question was what the testator meant by “next of kin” and that no considerations of status or legitimacy arose.

As the law of the testator’s domicile, when left to itself, will decide all questions connected with the construction and effect of his will that were not expressly contemplated, so any attempt by the testator himself to evade the provisions of that law will be futile. Thus, in *Hog v. Lashley* (m), it was held that though the personalty referred to by the will was locally situate in England, a Scotch testator could not exclude his children from the *legitim* or share in it given imperatively by the Scotch law. Similarly, in *Ommaney v. Bingham* (n), the law of the testator’s domicile was referred to in order to decide whether or not a condition in

Testator’s
intention to
evade *lex*
domicilii.

(i) This principle was adopted, both as to realty and personalty, by Kay, J., in *Andros v. Andros* (1883), 24 Ch. D. 637; and as to realty, in *In re Grey’s Trusts*, [1892] 3 Ch. 88.

(k) *In re Grove, Vaucher v. Treasury* (1887), 40 Ch. D. 216; see *ante*, chap. iv.

(l) *In re Ferguson*, [1902] 1 Ch. 483.

(m) (1792), 6 Bro. P. C. 577; 3 Hagg. Eccl. 415.

(n) (1796), 5 Ves. 757; 3 Hagg. Eccl. 414.

restraint of marriage, with a bequest over, was void. And the validity of a legacy to superstitious uses depends upon the *lex domicilii*, and not upon the law of the place where the uses are to be carried out, or where the legatees are domiciled (o). That is to say, the form of the domicile of the testator will decide for itself whether the legatees take under the will; but of necessity in such a case the carrying out of the uses must be left to the control of the local law.

A question has often arisen as to what wills are entitled to probate in the English Court, and it appears to be now settled that a will disposing *solely* of property situate abroad will not be admitted to probate here, unless it is incorporated by reference in another will entitled to probate on its own account, as disposing of property within this jurisdiction (p). But it seems that a mere mention in the English will of an intention to ratify and confirm the foreign one will be sufficient to incorporate it, so as to entitle it to probate (q). And where a testator expressed a distinct intention, in a will disposing of British property, that it should be regarded as independent of, and disconnected from, his general will, which disposed of other property in America at much greater length, Sir J. Hannen allowed the English will to be admitted to probate alone, an authenticated copy of the American will and codicils being ordered to be filed in the registry, and a note of such filing appended to the English probate (r). So where the testator, a domiciled Englishman, had made an English will in England, and afterwards a will in South America in the foreign form, disposing of all his property there (and *pro tanto* revoking previous dispositions of it), probate was granted of the English will only; and (by consent) the Spanish will, which had been deposited in the registry here, was ordered to be given out for probate abroad (s). In a subsequent case, when two wills had been executed, one according to the English form appointing English executors, and disposing of English property, the other in Swiss form disposing of property in Switzerland, probate was granted of the English will alone, on a copy of the Swiss will being filed in the registry (t). And when there was an English and a South African will, each in like manner

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Succession.

Foreign
wills, when
entitled to
probate.

(o) *In re Elliott, Elliott v. Johnson* (1891), 39 W. R. 297.

(p) *Re Murray*, [1896] P. 65; following *Re Howden* (1874), 43 L. J. P. & M. 26. Cf. *Re Coode* (1867), L. R. 1 P. & D. 449; *Re Bolton* (1887), 12 P. D. 202; *Re Tamplin*, [1893] P. 59.

(q) *Re Harris* (1870), L. R. 2 P. & D. 83; 39 L. J. P. & M. 48; *Re De la Saussaye* (1873), L. R. 3 P. & D. 43; 42 L. J. P. & M. 47.

(r) *Re Astor* (1876), L. R. 1 P. D. 150.

(s) *Re Smart* (1884), 9 P. D. 64.

(t) *Re De la Rue* (1890), 15 P. D. 185. In this case there was an affidavit that by Swiss law the English executors would have no power to interfere with the Swiss estate, which would be administered by the Swiss Court.

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*Movables—
Succession.*Foreign
grant of
probate
followed by
English
Court.

limited to the property in each country, the Court granted probate of the English will only, on an affidavit being filed exhibiting a copy of the South African will, and a statement to the effect of such affidavit being inserted in the probate (*u*). Where it was desired to prove in England the will of a foreigner domiciled abroad, and it was proved that by the foreign law the will was deposited with a notary, who was not allowed to send it out of the country, probate has been granted of a notarial copy (*x*).

A foreign grant of probate granted by the competent Court, i.e. the Court of the domicile of the deceased, will be followed by the English Court of Probate when application is made for a grant of probate or administration with the will annexed here (*y*). In the case of *Re Earl* (*y*) the person who had obtained probate as executrix from the Court of the domicile in New South Wales was not entitled to the grant here, but the Court granted her administration with the will annexed, under the discretionary power conferred upon it by 20 & 21 Vict. c. 77, s. 73. Lord Penzance, in reviewing the previous decisions on the subject, said: "The result of the cases (*z*) is that in the Prerogative Court the tendency was to follow the foreign grant where it could be done, but there was a reluctance to lay down any general rule on the matter; while the decisions in the Court of Probate have militated against the rule of following the foreign grant." Lord Penzance, after having referred to the *dicta* of Lord Westbury on the subject in *Enohin v. Wylie* (*a*), proceeded to say that he thought the Court ought to act upon the special power given to it by 20 & 21 Vict. c. 77, s. 73, and make a grant in all such cases to the person who had been clothed by the Court of the country of domicile with the power and duty of administering the estate, no matter who he was or on what ground he had been clothed with that power. The same principle was adopted in the case of *Re Hill* (*b*), where administration *de bonis* had been granted in America to those who applied for a similar grant here, the testatrix having died domiciled in America, and there being personal estate unadministered in this country. In cases where the powers granted to a person by a foreign will fell short of the powers of

(*u*) *Re Callaway* (1890), 15 P. D. 147.

(*x*) *Re Von Linden*, [1896] P. 148. *Re Lemme*, [1892] P. 89.

(*y*) *Re Earl* (1867), L. R. 1 P. & D. 450; *Re Hill* (1870), L. R. 2 P. & D. 89; *infra*, pp. 320-1. Followed in *Meatyrd's Case*, [1903] P. 125.

(*z*) *Larpent v. Sindry* (1828), 1 Hagg. Eccl. 383; *Re Read* (1828), 1 Hagg. Eccl. 476; *Countess Da Cunha's Case* (1828), 1 Hagg. Eccl. 237; *Duchess of Orleans' Case* (1859), 1 Sw. & Tr. 253; 28 L. J. P. & M. 129; *Viesca v. D'Aramburn*, 2 Curt. 230; *Re Rogerson* (1840), 2 Curt. 656.

(*a*) (1862), 10 H. L. C. 115.

(*b*) (1870), L. R. 2 P. & D. 89; so *Re Smith* (1868), 16 W. R. 1130.

executors according to English law, "there will be a grant to him of administration with powers as near as may be to those granted by the will" (c).

In *Re Tréfond*, [1899] P. 247, a will was made in English form by the wife of a domiciled Frenchman, *invalid by the lex domicilii*, but effectual by English law as a testamentary appointment under her marriage settlement. Administration with the will annexed was granted to the appointee, but limited to such property as the deceased had power to and did dispose of by such testamentary appointment.

The Court is empowered to exercise a discretion, under rule 30 of the Non-Contentious rules of 1862, to depart from the practice of refusing a limited grant to a person entitled to a general grant. In *Re Brentano*, [1911] P. 172, a domiciled foreigner left two wills, one executed according to the requirements of his *lex domicilii*, dealing with foreign assets and English personalty and appointing a foreign executor, and the other executed according to English form, dealing with English land and appointing English executors. The Court made separate grants—in the first place to the English executors limited to the realty, and, secondly, a *cæterorum* grant to the foreign executor.

(b) *Succession to Movable Personal Property by Operation of Law*.—It will have been already gathered from what has been said as to the law which governs the disposition of personal chattels by will, that the same principle of the *lex domicilii* applies, to succession to personal chattels *ab intestato*. The words of Lord Westbury, cited above (d), in *Enohin v. Wylie* (e) are as applicable to cases of succession *ab intestato* as to those of testacy. "It is now put beyond all possibility of question that the administration of the estate of a deceased person belongs to the Court of the country where the deceased person was domiciled at the time of his death. All questions of testacy and intestacy belong to the judge of the domicile" (f).

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Movables—
Succession.

Succession
to movables
ab intestato
—governed
by *lex domi-*
cilii—legiti-
macy of
next of kin
by law of
their domicile.

(c) Per Jeune, P., in *Re Von Linden*, [1896] P. 148, citing *Re Briesemann*, [1894] P. 260. Cf. *Re Gouin*, [1911] Nov. 4; and *Re Levy*, [1908] P. 108, in which cases judicial administrators were appointed in France for a limited time, and upon motion made here grants *ad colligendum* were made to them. Where the foreign grant is limited in extent, it is doubtful whether the Courts will systematically adopt the rule of making full grants. Cf. also *Surrey v. Perrin*, [1912] P. 233 (grant of administration *cum testamento annexo*).

(d) *Supra*, p. 298.

(e) (1862), 10 H. L. C. 13.

(f) Cf. Sir R. Arden's language in *Somerville v. Somerville* (1801), 5 Ves. 786. Other authorities to the same effect on the general question are: *Pipon v. Pipon* (1744), Ambl. 25; *Thorne v. Watkins* (1750), 2 Ves. 35; *Sill v. Worswick* (1791), 1 H. Bl. 690; *Balfour v. Scott* (1793), 6 Bro. P. C. 550; *Bruce v. Bruce* (1790), 2 B. & P. 229, n.; *Hunter v. Potts* (1791), 4 T. R. 182; *Potter v. Brown* (1804), 5 East, 130; *Thornton v. Curling* (1824), 8 Sim. 310; *Price v. Dewhurst* (1837), 8 Sim. 279; *Dogliani v. Crispin* (1866), L. R. 1

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It has been already stated that this language, so far as it asserts an *exclusive* right in the *forum domicilii*, is too large (g), but it is fully supported by recent authority so far as the *lex domicilii* is concerned; and for the purpose of determining the succession to movable estate, Lord Selborne has said that recourse must be had, not always or necessarily to the Courts, but always and necessarily to the law of the domicile” (h).

And where the title has been adjudicated upon by the Courts of the domicile, such adjudication is binding upon, and must be followed by, the Courts of this country (i).

But so far as the legitimacy of next of kin is concerned, it has been already more than once stated that English law refers the question of legitimacy, both in cases of testacy and intestacy, to the law of the domicile of the next of kin concerned. Thus, in cases under the Statute of Distributions, the legitimacy of a child claiming as next of kin is decided by the law of his domicile—*i.e.* the law of his father’s domicile at his birth (k).

And in cases of legitimisation *per subsequens matrimonium*, it has been held that the legitimisation must be recognised, not only by the law of the father’s domicile at the time of birth, but by the law of the father’s domicile at the time of the subsequent marriage (l).

Where the estate in England was that of a bastard, intestate without heirs, of Austrian domicile and nationality, it was held, in *Re Barnett’s Trusts*, [1902] 1 Ch. 847, that there was no succession, and that the English Crown took as *bona vacantia*.

It follows, from the rule just stated, that the succession duties payable in such cases are calculated on the assumption that the beneficiaries are legitimate by English law if they are legitimate by the law of their own domicile (m), though in the case cited the question arose under a will, and moreover at that time the law of the testator’s domicile was erroneously regarded as the governing law in such cases. The domicile of the testator and of the legatees happened in *Skottowe v. Young* to be the same. Under the old view of the law applicable to such cases,

H. L. 301; *Re Weaver* (1866), 36 L. J. P. & M. 41; *Blackwood v. R.* (1882), 8 A. C. 82; *Abd-ul-Messih v. Farra* (1888), 13 A. C. 431; *Re Grove, Vaucher v. Solicitor to the Treasury* (1888), 40 Ch. D. 216, C. A.

(g) *Ante*, p. 299; *Ewing v. Orr-Ewing* (1883), 10 App. Cas. 453, 503; *Ewing v. Orr-Ewing* (1883), 9 App. Cas. (Eng.) 34; *In re Trufort, Trafford v. Blanc* (1887), 36 Ch. D. 600. See *infra*, p. 311, for the English rule as to general administration.

(h) *In Ewing v. Orr-Ewing* (1883), 10 App. Cas. 453, 502.

(i) Per Stirling, J., in *In re Trufort* (1887), 36 Ch. D. 600, 611.

(k) *Re Goodman’s Trusts* (1881), 17 Ch. D. 266; overruling *Boyes v. Bedale* (1863), 1 H. & M. 798. See *ante*, pp. 311-2, and cf. chap. iv.

(l) *Re Grove, Vaucher v. Treasury* (1887), 40 Ch. D. 216.

(m) *Skottowe v. Young* (1871), 11 Eq. 474. See this case commented on in *Goodman’s Trusts* (1881), 17 Ch. D. 266; and cf. *Wallace v. Att.-Gen.* (1865), L. R. 1 Ch. 1, 8.

it had been held that the law of the domicile will prevail as to what is sufficient to constitute kinship; so that where the intestate died domiciled in England, leaving debts and *choses in action* recoverable in Scotland, the English rule as to kindred by half-blood, and not the Scotch, was followed (n).

The distinction between cases of distribution on intestacy, which are to be governed by the law of the intestate's domicile, and those in which the real question is how far the operation of the *lex situs* on his real property shall prevail, is well seen in two cases cited by Sir W. Grant in *Brodie v. Barry* (o). In the first the intestate's domicile was English, and it was accordingly held that the next of kin took his personalty by English law, so that the Scotch heir was not obliged to bring the Scotch realty into hotchpot, in order to claim his share, as the Scotch law would have compelled him to do (p). In the other case, where the domicile was also English, it was held that the personalty was not liable to be called upon to exonerate Scotch real estate from debts to which it alone was liable by Scotch law, although the English law would have imposed such a burden upon English land (q). Obviously this decision does not touch the claim of the *lex domicilii* to govern all questions affecting the personalty only, and, in accordance with this general principle, it was held in *Hog v. Lashley* (r) that a Scotch testator could not exclude his children from the *legitim* or share in his personalty given to them by the Scotch law, though the property was situate in England. In *Ommaney v. Bingham* (s) it was decided that the law of the testator's domicile determined whether or not a condition in restraint of marriage with a bequest over was void. These two last cases properly come under the head of succession to personal property by will; but the principles regulating the two branches of the subject are almost identical, and they are virtually authorities for the general principle, that the rights and liabilities of those entitled to succeed to the movable personalty of a deceased person are governed by the law of his domicile. The duties of executors and administrators will be considered immediately.

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PROPERTY.

CAP. VII.

Movables—
Succession.

(c) *Right and Title of the Personal Representative.*—Closely connected with the subject of succession to personal chattels either by will or *ab intestato*, come the principles by which these personal chattels are collected and made available for the pur-

Title of
foreign
executor or
adminis-
trator.

(n) *Thorne v. Watkins* (1750), 2 Ves. Sen. 35.

(o) (1813), 2 Ves. & B. 131.

(p) *Balfour v. Scott* (1793), 6 Bro. P. C. 550.

(q) *Drummond v. Drummond* (1791), 6 Bro. P. C. 601.

(r) (1792), 6 Bro. P. C. 577; 3 Hagg. Eccl. 415.

(s) (1796), 5 Ves. 757; 3 Hagg. Eccl. 414.

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poses of succession, after clearing the estate of the deceased from all burdens and claims. In cases where all the personal chattels of the deceased are in one country, and that country the country of his domicile, no difficulty arises; and the personal representative who is appointed by the domiciliary Court either to execute the will or to administer the estate, as the case may be, takes possession of all the estate of the deceased by the authority of the Court which appointed him, and deals with it in accordance with the law which that Court enforces. But in many cases it happens that the personal estate of the deceased is not situate in the country of his domicile, or not wholly so situate; and it is plain, first, that some other authority than that of the Court of the domicile is necessary to enable any representative of the deceased to take possession of it; and, secondly, that there will be in many cases a conflict of law as to the principles by which he should be guided in dealing with it.

Grant of
probate or
administra-
tion—no
extra-
territorial
effect.

The first general principle which can be laid down on the subject is that a foreign grant of probate or letters of administration is intra-territorial only in its operation, and that the title so conferred extends only as of right to personal estate within the jurisdiction of the Government which granted it (*t*). Consequently, to entitle the personal representative of a man who has died abroad to take possession of personal estate here, he must prove the will or take out letters of administration here as well as in the country of the domicile (*u*). This rule extends to *choses in action*, it being an established rule (*x*) that, in order to sue in any Court of this country in respect of the personal rights or property of a deceased person, the plaintiff must appear to have obtained probate or letters of administration in the Court of Probate of this country. But as between the administrator in the *forum* of the domicile, and local or limited administrators elsewhere, it has been held that the former is the person to receive any surplus or balance of the estate in the hands of the limited administrators (*y*). Thus, where a company is being wound up in an English Court no personal representative of a creditor can establish his debt without an English probate or

Foreign
representa-
tive—no
right to sue.

(*t*) Story, § 512.

(*u*) *Lee v. Moore*, Palm. 163; *Tourton v. Flower* (1735), 3 P. Wms. 369; *Vauthienen v. Vauthienen*, Fitzgib. 204; *Le Briton v. Le Quesne*, 2 Cas. temp. Lee, 261; *Att.-Gen. v. Bouwens* (1838), 4 M. & W. 193.

(*x*) Williams, *Executors and Administrators* (1905), vol. i. p. 271; *In re Vallance* (1883), 24 Ch. D. 177; *Att.-Gen. v. Bouwens* (1838), 4 M. & W. 193; *Tyler v. Bell* (1837), 2 My. & Cr. 89; *Att.-Gen. v. Cockerell* (1814), 1 Price, 179; *Whyte v. Rose* (1842), 3 Q. B. 507; *Enohin v. Wylie* (1862), 10 H. L. C. 19; *Macmahon v. Rawlings*, 16 Sim. 429; *Carter and Crost's Case* (1585), Godb. 33.

(*y*) *Eames v. Hacon* (1880), 16 Ch. D. 407; *S. C.* on appeal, 18 Ch. D. 347; *Enohin v. Wylie* (1862), 10 H. L. C. 1; *De la Viesca v. Lubbock*, 10 Sim. 679.

letters of administration, though the deceased creditor was domiciled abroad (*z*). Even a stop-order cannot be obtained without complying with this requisite (*a*). But an English grant of probate or administration properly obtained here is by the English Courts regarded as extending to all the personal property of the deceased, wherever situate at the time of his death (*b*), at least in such a sense that a representative duly constituted in England may sue in England in relation to foreign assets; and in a case before Sir F. Nicholl (*c*), where a domiciled Englishman died in France, leaving two testamentary papers relating to personalty there, and the first of them also to personalty and realty in England, his widow was granted administration with both papers annexed, though a doubt was expressed whether and in what sense such administration extended to the French property. This case was followed by Sir C. Cresswell in *Re Winter* (1861), 30 L. J. P. & M. 56, but the true rule on the point, as has been already stated, was laid down in the later cases cited above (*d*); and now it may be taken that a will disposing solely of property situate abroad will not be admitted to probate here unless it is incorporated by reference in another will entitled to probate here as disposing of property within the jurisdiction; though a mere mention in the English will of an intention to ratify and confirm the other will be sufficient. To support a right of action, however, a grant of representation or probate in England is only necessary where the plaintiff is suing *qua* personal representative, in the right of the deceased (*e*). Thus, where a foreign administrator has already obtained a judgment abroad against an English debtor of his intestate, he may prove in England against the estate of that debtor, if since dead, without taking out English administration to his own intestate (*f*). And in granting probate to the executor of a person who has died domiciled abroad, it is the duty of the Court of Probate, in accordance with the comity of nations, to follow the grant (if any) made by the competent Court of the domicile (*g*). In accordance with this principle, it has been the practice, upon the

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*Movables—
Succession.*Foreign
grant of
probate
followed by
English
Court.

(*z*) *Partington v. Att.-Gen.* (1869), L. R. 4 H. L. 100.

(*a*) *Christian v. Devereux*, 12 Sim. 264. But probate granted by the Supreme Court at Hong Kong, which by imperial statute has all such jurisdiction as for the time being belongs to the Court of Probate in England, has been admitted in an English court: *In re Tootal's Trusts* (1883), 23 Ch. D. 536.

(*b*) *Whyte v. Rose* (1842), 3 Q. B. 498, 507; *Scarth v. Bishop of London* (1828), 1 Hagg. Eccl. 625.

(*c*) *Spratt v. Harris* (1833), 4 Hagg. Eccl. 405, 409.

(*d*) *Re Lord Howden* (1874), 43 L. J. P. & M. 27; *Re Coode* (1867), L. R. 1 P. & D. 449; *Re Harris* (1870), L. R. 2 P. & D. 83; 39 L. J. P. & M. 48; *Re De la Saussaye* (1873), L. R. 3 P. & D. 43; 42 L. J. P. & M. 47.

(*e*) *Vanquelin v. Bouard* (1863), 15 C. B. (N.S.) 341.

(*f*) *Macnichol v. Macnichol* (1874), L. R. 19 Eq. 81.

(*g*) *Enohin v. Wylie* (1862), 10 H. L. C. 1, 14.

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PROPERTY.

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Movables—
Succession.

Foreign
grant of
adminis-
tration—
how far
followed.

production of an exemplified or certified copy of the probate granted by the proper Court of the domicile, for the English Court to make its own grant of probate to the executor who proved there (h). But where the Court of the domicile appears to have decreed probate, not of the original will, but of a translation of it, the English Court will not require production of the original will, but only of an English translation of the document admitted to probate abroad (i). And the doubt expressed as to the expediency of the practice by Sir J. Nicholl in *Larpent v. Sindry* and in *Re Read* (k) must now be regarded as set at rest by the judgments of Lord Westbury and Lord Cranworth in *Enohin v. Wylie*. So where the Court of the domicile has decreed that the time limited by its law for the execution of the executorship has passed, and that the executor has no more right to intermeddle in the estate of the testator as against the persons beneficially interested, the Court held itself bound by such decree, and refused to grant probate as to English personalty to such executor (l). Similarly, in granting ancillary administration, the Court will follow a grant already made in the court of the domicile, and in granting original administration will guide itself by the law of that court (m). And administration with the will annexed has been granted to the attorneys in England for the Administrator-General of a British colony, upon whom by the law of that colony had devolved the representation of a testator there domiciled (n). But in *Re Cosnahan* (o) Lord Penzance said that the Court would not follow a foreign grant so as to treat the claimant as executor to the tenor of a will, where he did not appear to it to be entitled to such a grant, but admitted that the foreign grant should be followed so far as to treat the deed as testamentary, and eventually granted the claimant administration with the will annexed under the discretionary power given by 20 & 21 Vict. c. 77, s. 73. In a later case the same judge used language not quite consistent with this decision, saying, "I have before acted on the general principle that where the Court of the country of the domicile of the deceased makes a grant to a party, who then comes to this Court and

(h) *Re Clarke* (1867), 36 L. J. P. & M. 72; *Larpent v. Sindry* (1828), 1 Hagg. 382; *Re Cringan* (1828), 1 Hagg. 549; *Re Rioboo*, 2 Add. 461; *Viesca v. D'Aramburn*, 2 Curt. 277; *Re Henderson* (1868), 2 Robert. 144; *Re Smith* (1868),* 2 Robert. 332.

(i) *Re Rule* (1878), 4 P. D. 76.

(k) (1828), 1 Hagg. 474.

(l) *Laneville v. Anderson* (1862), 2 Sw. & Tr. 24; see *Crispin v. Doglioni* (1863), 3 Sw. & Tr. 96; S. C. L. R. 3 H. L. 301.

(m) Williams, Executors and Administrators (1905), vol. i. p. 338; *Enohin v. Wylie* (1862), 10 H. L. C. 1, and cases cited in note (h) above.

(n) *Re Black* (1887), 13 P. D. 5.

(o) (1866), L. R. 1 P. & D. 183; and cf. *Re Von Linden*, [1896] P. 148; *Re Briesemann*, [1894] P. 260.

satisfies it that by the proper authority of his own country he has been authorised to administer the estate of the deceased, I ought, without further consideration, to grant power to that person to administer the English assets" (p).

In *Re Weaver* (1866), 36 L. J. P. & M. 41, the principle of following a foreign grant of administration was recognised, but the Court refused to extend it so far as to follow a grant made to a nominee of the person entitled, except upon the express consent of the latter, there being nothing to show that the consent given to the appointment of the nominee, as to the goods in the country of the domicile, was intended to apply also to goods situate here. As to the evidence required by the English Court of the will upon which foreign probate has been granted, a translation of the will proved in the foreign court should be adduced; and where the document used in that foreign Court was itself a translation from an English original, a re-translation of that translation is the proper document to produce; though it is, of course, open to those seeking English probate to claim it on the ground that the will is valid by the law of the foreign domicile, without reference to the foreign decree, in which case the original English will, or a copy of it, should be used (q). In the words of Hannen, J., "If this Court is to give credit to a foreign Court for having duly investigated all the facts of a case upon which it founds its decree, it must also assume that it has satisfied itself of the accuracy of the document upon which it proceeds" (r). The English grant being in general terms, probate will not be given of extracts only of a foreign will purporting to deal with the testator's assets in England (s).

Under 25 & 26 Vict. c. 121, when subjects of foreign States shall die in her Majesty's dominions, and there shall be no person to administer their estates, the consuls of such foreign States shall administer, and shall be entitled to obtain from the proper Court letters of administration of the effects of such deceased person, limited in such manner and for such time as the Court shall think fit. These provisions, however, are only to apply to the subjects of such foreign States as shall be specified by Order in Council, with whom agreement shall have been made by treaty for securing similar rights to British subjects and British consuls within their dominions. Apart from this statute, the law of this country will not, it seems, recognise the right of a foreign consul to take possession of or administer the property of a foreigner

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Succession.

Statutory
provisions
for adminis-
tration by
consuls.

(p) *Re Hill* (1870), L. R. 2 P. & D. 89. See *Preston v. Melville* (1840), 8 Cl. & F. 1.

(q) *Re Deshais* and *Re Vigny* (1865), 4 Sw. & Tr. 15.

(r) *Re Rule* (1878), 4 P. D. 76. See also *Re Clarke* (1867), 36 L. J. P. & M. 72.

(s) *Re Von Faber* (1904), 20 T. L. R. 640.

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Succession.

Foreign
adminis-
trators—
cannot
transfer
their title.

dying here, who is domiciled in his own country, even though none of those otherwise entitled object to the grant (*t*).

When a grant of administration has been once made, the person who has received it is the person bound to administer the effects of the deceased within the jurisdiction, and it makes no difference that he may have consented to the appointment of another representative in the Court of the domicile. Thus, in *Preston v. Melville* (1840), 8 Cl. & F. 1, the persons named as trustees and executors in the will of a domiciled Scotchman having declined to act, his next of kin obtained letters of administration of his personal estate in England from the proper Court there, and afterwards consented to the appointment, by the Court of Session in Scotland, of other persons as trustees and executors in the place of those named in the will, with all the powers that had been thereby given to them. These trustees so appointed raised an action in the Court of Session against the administratrix, calling on her to transfer to them the personal estate possessed by her under the administration, and offering her a full release from liability. The House of Lords held that the English administratrix was the proper person to administer the personal estate in England, by virtue of the letters of administration, and that the Scotch Court could give no title to such estate. But if the substituted trustees had been appointed executors in Scotland before the next of kin took out administration in England, and with her consent, there can be little doubt that the English Court would have held them entitled to administration here in preference to her claim as next of kin. Their appointment would then have been sanctioned by the Court of the domicile—the appointment being, of course, the act of the Scotch Court—and the next of kin would have been no longer entitled by the law of the domicile at the time the application was made to the English Court, so that the observations of Lord Cranworth in *Enohin v. Wylie* (*u*) would apply.

The liability to account to the Court which grants administration is not affected by the fact that he applies for and receives the grant as attorney for the person really entitled. Thus, when letters of administration in England were granted to one R. W., the attorney of the widow of the deceased, she being resident in New York, it was held that the attorney was responsible for the distribution, and was not discharged by payment to his principal (*x*).

(*t*) *Aspinwall v. Queen's Proctor* (1839), 2 Curt. 241, 247; *Re Wyckoff* (1862), 3 Sw. & Tr. 20; Williams, *Executors and Administrators* (1905), vol. i. p. 339, note (*y*).

(*u*) (1862), 10 H. L. C. 1. See *Eames v. Hacon* (1880), 18 Ch. D. 347.

(*x*) *In re Rendell, Wood v. Rendell*, [1901] 1 Ch. 230.

The grant of administration once having been made, the title of the administrator to all the effects within the jurisdiction becomes complete, and remains though they be carried out of it, unless they come into another jurisdiction as unappropriated assets of the deceased. Thus, where the widow of an intestate in India took out administration of his effects there, and remitted the proceeds of those effects in Government bills to her agent in England, and a creditor of the intestate, having taken out administration in this country, brought an action against that agent to recover such proceeds, it was held that no action would lie (y). But in *Hervey v. Fitzpatrick* (1854), Kay, 421, Lord Hatherley held that where a foreign administrator had remitted assets to England and come himself after them, he might be sued in a Court of equity by the next of kin who had taken out English administration, in respect of those assets. The decision, however, was put on the ground that the foreign administrator had transmitted the assets to England for the purpose of their being carried to the account of the estate of the deceased owner, and the Court refused to order the defendant to pay the proceeds of the assets in question into Court. This was in effect the same principle as that adopted by Sir J. Leach in *Logan v. Fairlie* (z), who says, "If a testator die in India, and his personal estate be wholly in India, and his executor be resident there, and the will be proved there, and the executor remit to a legatee in England, I am of opinion that the legacy duty is not payable upon such remittance, inasmuch as the whole estate is administered in India, and the remittance is in respect of a demand, which is to be considered as established there. But if a part of the assets of the testator is found in England, *in the hands of the agent of such executor, without any specific appropriation, and a legatee in England institute a suit here for the payment of his legacy out of such unappropriated assets, then such assets are to be considered as administered in England.*" And though the decision of Sir J. Leach in this case as to the liability of such assets to legacy duty was subsequently reversed (a), on the authority of *Att.-Gen. v. Jackson* (1834), 2 Cl. & F. 48, which will be noticed when the rules as to the payment of legacy, succession, and probate duties are discussed, yet the above statement of the law as to specific appropriation of assets by an administrator was quoted with approval by the Court. When, therefore, proceedings are commenced in England as to unappropriated assets within the jurisdiction, administration should be

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Movables—
Succession.Title of
adminis-
trator—to
what effects
it extends.

(y) *Currie v. Bircham* (1822), 1 Dowl. & Ry. 35; *Jauncey v. Seeley* (1686), 1 Vern. 397.

(z) (1825), 2 Sim. & Stu. 284; 1 My. & Cr. 59.

(a) *Logan v. Fairlie* (1825), 1 My. & Cr. 59.

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*Movables—
Succession.*Scottish con-
firmations.

taken out in England, and the administrator made a party to the suit (b). So where it did not even appear that the intestate, who died in India, had at the time of his death assets in England, but a bill was brought here for an account of the assets in the hands of his personal representative in India, it was held that administration must be taken out in England and the administrator made a party (c).

With regard to the effect of Scottish probates or “confirmations,” as they are called, in England, it is enacted by 21 & 22 Vict. c. 56, s. 12, that when any confirmation of the executor of a person who shall in manner aforesaid be found to have died domiciled in Scotland, which includes besides the personal estate situate in Scotland also personal estate situate in England, shall be produced in the principal Court of Probate in England, and a copy thereof deposited with the registrar, together with a certified copy of the interlocutor of the commissary, finding that such deceased person died domiciled in Scotland, such confirmation shall be sealed with the seal of the said Court, and returned to the person producing the same, and shall thereafter have the like force and effect in England as if a probate or letters of administration, as the case may be, had been granted by the said Court of Probate. Under this section, when the seal of the English Court has been affixed, the executor has all the powers of an English executor, and may sell and dispose of English leaseholds, although specifically bequeathed, though a Scots executor cannot deal with leaseholds in Scotland (d). And the enactment incorporates with it 48 Geo. 3, c. 149, so that where additional property is discovered in this country after sealing the confirmation, an additional confirmation may be issued in Scotland and the seal of the English Court affixed to that (e). But when one confirmation has been sealed in England, the Court will not allow its seal to be further affixed to an “eik” or additional confirmation; and this whether the additional confirmation include a part of the estate omitted from the original one or not (f). A similar enactment is made as to Irish probates by 20 & 21 Vict. c. 95.

Though it is thus clear that no man has any right to assume title to the assets of a deceased person, except by virtue of

Foreign
representa-
tive acting
as executor
de son tort.

(b) Williams, *Executors and Administrators* (1905), vol. i. p. 271, citing *Logan v. Fairlie* (1825), 1 My. & Cr. 59; and *Lowe v. Fairlie*, 2 Madd. 101.

(c) *Tyler v. Bell* (1837), 2 My. & Cr. 89; *Bond v. Graham* (1842), 1 Hare, 482; *Flood v. Patterson*, 29 Beav. 295.

(d) *Hood v. Barrington* (1868), L. R. 6 Eq. 218.

(e) *Re Ryde*, L. R. 2 P. & D. 86. See also on this section *Hawarden v. Dunlop*, 2 Sw. & Tr. 340; Williams, *Executors and Administrators* (1905), vol. i. p. 270.

(f) *Re Hutcheson*, 32 L. J. P. & A. 167; *Re Gordon*, 2 Sw. & Tr. 622; *Re Wingate*, *ibid.* 625.

probate or letters of administration taken out in the country where they are situate, yet a question has sometimes arisen as to what is the position of a foreign personal representative who has done so, and how far payments to him by debtors of the deceased are a good discharge to them of their liabilities. Such a person intermeddling with English assets would, it is clear, be regarded as executor *de son tort*, the commonly accepted definition of such an executor being "he who takes upon himself the office of executor by intrusion, not being so constituted by the deceased, nor, for want of such constitution, substituted by the Court to administer" (g); and as such an executor has all the liabilities, though none of the privileges, that belong to the character of executor (h), it is clear that he would be liable to actions in the country where the assets were found situate, as the representative of the deceased, at least, as far as the amount of those assets. Unless a foreign personal representative has received English assets, so as to make himself liable in England on this principle, or has taken out administration here, he is of course not liable to be sued, *qua* representative, in English Courts, however unlimited his foreign liability may be (i). But whatever liability might attach to such an executor *de son tort*, would his receipt be a good discharge to debtors of the deceased's estate, so as to protect them from any further demand of the same debt at the hands of a representative properly constituted? It was laid down in *Coulter's Case* (1698), 5 Co. 30 b, that "all lawful acts which an executor *de son tort* doth are good"; and it has been held that alienations of the goods of the deceased by such an executor are indefeasible (k). These authorities, however, by no means go so far as to sanction the collection of assets by such an executor, or to protect those who have made payments to him without satisfying themselves that he has authority to give them a discharge. Story inclines to the opinion that such discharge would be invalid, on the ground that receiving debts amounts to a collection of assets, which no man is empowered to do except by a grant of probate or administration in the country where he finds them (l). It is clear that a foreign personal representative would have no advantage in this respect over a common executor *de son tort* (m).

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Succession.*

(g) Godolphin, pt. 2, c. 8, s. 1; Wentworth, Off. Ex. c. 14, p. 320 (ed. 14); Swinburne, pt. 4, s. 23, pl. 1. *Att.-Gen. v. New York Breweries Co.*, [1899] A. C. 62.

(h) Per Lord Cottenham in *Carmichael v. Carmichael*, 2 Phill. 101.

(i) *Beavan v. Lord Hastings* (1856), 2 K. & J. 724.

(k) *Greysbrook v. Fox*, Plowd. 282; *Parker v. Kett*, 1 Raym. 661; S. C. 12 Mod. 471.

(l) Story, § 514; *Preston v. Melville* (1840), 8 Cl. & F. 1, 12; *Att.-Gen. v. Bouvens* (1838), 4 M. & W. 71.

(m) *Partington v. Att.-Gen.* (1869), L. R. 4 H. L. 100.

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Movables—
Succession.Release by
foreign
representa-
tive.Obligation
of repre-
sentative
to account
—for what
assets.

According to the old case of *Daniel v. Luker* (1571), Dyer, 303; Dal. 76, a release given by an Irish administrator to the Irish obligee of a bond made in England, and afterwards taken possession of in England by the English administratrix, the intestate having died there, was held to be no answer to an action on the bond in England by the English administratrix, on the express ground that bonds are *bona notabilia* in the diocese where they are found at the time of death (*n*). It is difficult to regard the *situs* of such a bond as the real locality of the assets represented by it, in preference to the country where the debtor must be sued, and in *Whyte v. Rose* (1842), 3 Q. B. 493, where the circumstances of *Daniel v. Luker* were reversed, it was held that a grant of administration in the foreign country where the bond was situate was not necessary to entitle an English administrator to sue in England, the debtor having come within the jurisdiction of the English Court. There can be no doubt that if a release had been given by a person who had obtained administration in the foreign country where the bond was *bonum notabile* at the time of the death, that release would have been a good answer to a subsequent action by any administrator in any other country, whether that of the domicile or not (*o*); but there is no English authority to show that where a debtor to the estate of the deceased has paid a personal representative who could not have enforced the claim against him by suit, he can in any case protect himself by such a discharge of his liability.

Though it thus follows that no personal representative has a right to collect assets or give discharges for debts in any country other than that where his grant was obtained, yet where he does so, and brings them home within the jurisdiction of the Court from which his grant proceeded, it would seem that he is liable to account to it for the administration of those assets, just as if they had been received and collected within the limits of his authority (*p*). Though this doctrine is mentioned with some disapprobation by Story, it would appear to follow, from the view of the English Courts, mentioned above, that a grant of probate or administration properly obtained here extends to all the personal property of the deceased, wherever situate at the time of his death, at least in such a sense as to entitle an English representative to sue in relation to foreign assets (*q*).

(*n*) *Trowbridge v. Taylor*, temp. Jac. I., cited Dyer, 305; 11 Vin. Ab. 79; 1 Rol. Ab. 909.

(*o*) *Shaw v. Sturton*, 2 Lev. 86; 3 Keb. 163; *Huthwaite v. Phaire* (1840), 1 M. & Gr. 159.

(*p*) *Dowdale's Case* (1604), 6 Co. 47; Story, § 514, a.

(*q*) *Whyte v. Rose* (1842), 3 Q. B. 507; *Scarth v. Bishop of London* (1828), 1 Hagg. Eccl. 625.

(d) *Probate and Administration Duties*.—The personal representative of the deceased being therefore compellable to clothe himself with the authority of the English Courts, in order to reduce into possession assets locally situate in England, as has been explained, comes under the English Acts which regulate the probate and administration duties to which the English assets are liable without reference to the domicile of the testator or intestate (r). The amount of this duty is to be regulated, not by the value of all the assets which an executor or administrator may ultimately administer under the will or letters of administration, but by the value of such part as is at the death of the deceased within the jurisdiction of the Court by which the probate or letters of administration are granted (s). It is an expense of collection, which is to be borne by the assets collected in the country where it is charged, not rateably by the whole personal estate, or general legatees (t). Moreover, it attaches on *bona notabilia* in the place where the goods happen to be situate, wholly irrespective of the question of the domicile of the testator (u), the test being whether the goods in question are effects which, under the old law, the Ordinary would have had to administer in case of intestacy (x).

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*Movables—
Succession.*Probate,
adminis-
tration and
estate duty,
on what
effects they
attach.

(e) *Succession and Legacy Duty*.—It has thus been shown that for the purpose of probate or administration duty, which is a tax imposed by the Government within whose dominion the property lies, upon its collection into the hands of the personal representative, the local situation of the property is alone taken into consideration. For the purpose, however, of legacy or succession duty, which is a tax upon the transmission of property, the actual situation of the subject-matter is disregarded, and the maxim "*mobilia sequuntur personam*" strictly adhered to. In *Thomson v. Advocate-General* (1845), 12 Cl. & F. 1, it was finally decided that legacy duty is payable only to the Government of the testator's domicile without reference to the actual locality of the property at the time of his death. And mortgages, though secured on foreign land, are personal or movable property for this purpose, though *aliter* as to any estate or interest in foreign land not subject to redemption, and not

Succession
and legacy
duties—
dependent
on the
domicil of
deceased.

(r) By the Finance Act, 1894, 57 & 58 Vict. c. 30, probate duty in England was superseded by "estate duty," as to which see *infra*, p. 328. The decisions on probate duty, however, remain applicable.

(s) Williams, *Executors and Admin.* (1905), vol. ii. p. 1712; *Raymond v. Von Watteville*, 2 Cas. temp. Lee, 551.

(t) *Peter v. Stirling* (1878), 10 Ch. D. 279.

(u) *Fernandes' Executor's Case* (1870), L. R. 5 Ch. 314; *Thomson v. Advocate-General* (1845), 12 Cl. & F. 1.

(x) *Att.-Gen. v. Bouwens* (1838), 4 M. & W. 171; *Hope v. Blackwood*, 8 App. Ca. 82.

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held as security for debt (y). The same has been held as to the proceeds of foreign immovables (realty in leaseholds) which formed part of the assets of a partnership to which the deceased belonged; on the ground that in equity real estate acquired for partnership purposes is, as between the parties, or as between the real and personal representatives of a deceased partner, personal estate (z). It will be noticed that in *Forbes v. Steven* the proceeds of the foreign land were actually in the hands of the Court, and were being distributed in a partnership suit; so that no question of jurisdiction to impose the tax could arise.

The same principle was established as to succession duty in the event of intestacy by the case of *Wallace v. Att.-Gen.* (1865), 1 Ch. 1. According to Parke, B., in *Att.-Gen. v. Napier* (1851), 6 Ex. 220 (a), the correct doctrine was first broached in *In re Erwin* (1830), 1 Cr. & J. 151, and rests upon the general principle, that for ordinary purposes personal property is to be considered as situate in the place where the owner of it is domiciled at the time of his death, the previous decisions inconsistent with this view having been decided without adverting to the important distinction between domicile and residence. Where a person dies abroad, the onus of proof appears to be on the Crown to show that his domicile was English, the presumption of law being against that view; and unless this burden of proof is successfully maintained, the Crown will not be entitled to legacy duty (b). The rule laid down by Lord Cranworth in *Wallace v. Att.-Gen.* is strictly confined in its operation to personal chattels, and the duty is not due upon a legacy or annuity charged on foreign land (*Att.-Gen. v. Napier*), or upon the proceeds of such land directed to be converted, nor upon chattels real abroad. But chattels real in this country come, of course, under the operation of the English Legacy and Succession Duty Acts, without regard to the domicile of the owner.

Estate Duty.

Estate duty.

By the Finance Act, 1894 (57 & 58 Vict. c. 30), probate duty was superseded by a new duty called estate duty. Estate duty, although it is leviable on property which was left untouched by probate duty, such as real estate, is yet in substance of the same

(y) *Lawson v. Commrs. of Inl. Rev.* (1896), 2 Ir. R. 418. But the local situation of a mortgage debt is apparently at the domicile of the mortgagee (*Sudeley v. Att.-Gen.*, [1897] A. C. 11).

(z) *Forbes v. Steven* (1870), L. R. 10 Eq. 178; *Stokes v. Ducroz* (1890), 38 W. R. 535.

(a) The principle has been expressly adopted by the Judicial Committee of the Privy Council, in *Lambe v. Manuel*, [1903] A. C. 68; and *Harding v. Commissioners, &c., Queensland*, [1898] A. C. 769.

(b) *President of United States v. Drummond* (1864), 33 L. J. Ch. 501; *Anderson v. Laneville* (1854), 9 Moo. P. C. 325.

Assessed on
foreign
movables
only.

nature as the old probate duty. What it taxes is not the interest to which some person succeeds on a death, but the interest which ceased by reason of a death.

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Estate duty is chargeable—

(i) Upon all real and personal estate in the United Kingdom belonging to the deceased wherever domiciled (s. 2 (1)) (c). So far as personal estate in the United Kingdom is concerned, estate duty merely takes the place of probate duty. So far as relates to real estate, it is a new tax.

(ii) Upon all property passing on the death of the deceased, situate out of the United Kingdom, if, under the law in force before the Finance Act, 1894, either legacy or succession duty is payable in respect thereof, or would be so payable but for the relationship of the person to whom it passes (s. 2 (2)). And by s. 37 of the Finance Act, 1923 (13 & 14 Geo. 5, c. 14), in the case of property passing on the death of a person who dies on or after the 16th April, 1923, where such property situate out of Great Britain is bequeathed to or settled on different persons in succession, and legacy duty or succession duty has, whether before or after the commencement of the Act of 1923, been paid thereon, such duty shall, for the purposes of s. 2 (2) of the Act of 1894, be deemed to be payable in respect of the property on the death of each of these persons in succession, notwithstanding that the whole amount of the duty was paid on one death only, as in the case of a legacy to one person. It has been seen above that where the deceased was domiciled within the United Kingdom, legacy duty is payable in respect of all movable property situate within or without the United Kingdom (d), including mortgage debts (e), and also in respect of foreign immovables forming part of the assets or a partnership to which the deceased belonged (f).

Succession duty, speaking generally, is chargeable on all movable property here or abroad when the predecessor was a testate or intestate domiciled in the United Kingdom, and also upon all movable property here or abroad to which the successor becomes entitled by the law of this country or under an English deed of settlement. It is not in any case chargeable upon foreign immovables.

By s. 20 of the Finance Act, 1894, it is enacted that, “where the Commissioners are satisfied that in a British possession to which this Act applies, duty is payable by reason of a death in

Property
already sub-
ject to duty
in British
possessions.

(c) Cf. *Winans v. Att.-Gen.*, [1910] A. C. 27.

(d) *Thomson v. Advocate-General* (1845), 12 Cl. & F. 1, *ante*, p. 327.

(e) *Lawson v. Commissioners of Inl. Rev.*, [1896] 2 Ir. R. 418.

(f) *Forbes v. Steven* (1870), L. R. 10 Eq. 178; *Stokes v. Ducroz* (1890), 38 W. R. 535.

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respect of any property situate in such possession, and passing on such death, they shall allow a sum equal to the amount of such duty to be deducted from the estate duty payable in respect of that property on the same death.”

This section is intended to avoid the incidence of a double duty in cases where a testator or intestate is domiciled within the United Kingdom, and leaves movable property in a British possession liable to a local succession duty there. Cases may also arise where succession duty would have been chargeable, although the deceased was not domiciled in England, under the principle discussed in the cases already cited (*g*).

Since the liability of movable personal estate to taxation is not strictly within the scope of the present treatise, in view of the intricate character of the legislation relating to succession and legacy duty and estate duty, and of the numerous decisions relating to such legislation, the present editor has deemed it inadvisable to attempt to deal with the subject in detail. The summaries contained in former editions have therefore been omitted. Reference should be made to text-books dealing solely with this subject, such as Hanson's *Death Duties* (7th ed., 1925), by Mr. Francis H. L. Errington.

Distribution
of movables
by personal
representa-
tive.

(*f*) *Distribution of Movable Personal Estate by Executors and Administrators.*—The principles by which the administration of personal estate is governed having thus been considered with regard to the appointment and title of the personal representative, and the duties payable to the Governments by whose authority or permission he acts, it remains to discuss the rules by which he is to be guided in satisfying such claims as may be put forward to the personal estate in his hands. Under this head of the subject come all questions which relate to the priority of debts, the marshalling of assets, and the mode of proof against the estate, if it should be insolvent. It is needless to recapitulate the numerous authorities which have already been cited (*h*) to establish the general rule that the distribution of personal estate is governed by the law of the domicile. And it is the duty of local or limited administrators to remit or pay over to the administrator in the *forum* of the domicile any surplus or balance in their hands of the personal estate got in by them (*i*). But with regard to the question of the priority of debts, with regard, that is, to its distribution as affects creditors, as distinguished

(*g*) *Att.-Gen. v. Campbell* (1872), L. R. 5 H. L. 524; *Att.-Gen. v. Jewish Colonisation Association*, [1902] 1 Q. B. 123, *supra*, p. 327.

(*h*) *Supra*, p. 315.

(*i*) *Eames v. Hacon* (1880), 16 Ch. D. 407; S. C. 18 Ch. D. 347; *Enchin v. Wyllie* (1862), 10 H. L. C. 1; *De la Viesca v. Lubbock*, 10 Sim. 629.

from persons beneficially interested, an important doubt has been introduced. In a case where the deceased was domiciled abroad, and ancillary administration is taken out to his effects here, is such local administrator to be governed by the laws of this country or that of the domicile of the deceased, in paying creditors who make their claim upon him in this country? And is there any difference as to this between debts originally contracted here, and those contracted in the country of the domicile? Westlake and Story (*k*) lay down positively that the law of the country from which the ancillary representative obtained his grant is to be followed, on the ground that he is accountable to that jurisdiction alone. This position, however, involves the assumption that the law of that jurisdiction does not adopt the law of the domicile of the deceased for such purposes, as it undoubtedly does for the general distribution of personal effects, and appears inconsistent with the *dictum* of Abbott, C.J., in *Birtwhistle v. Vardill* (1826), 5 B. & C. 452, that it is part of the law of England that personal property should be distributed according to the *jus domicilii*. It is, however, now settled that, in the administration of the English estate of a deceased domiciled abroad, foreign creditors of the same class are entitled to dividends *pari passu* with English creditors (*l*), and it is said in the case cited, by Pearson, J., that the *lex fori* must prevail, both as to the collection of assets, and as to the administration of those assets when collected. Prior to this decision the cases appear to have been conflicting, and the decision of Romilly, M.R., in *Wilson v. Dunsany* (1854), 18 Beav. 293, is especially disapproved of by the learned judge. In *Cook v. Gregson* (1854), 2 Drew. 286 (*m*), all that was decided was that an Irish judgment debtor of a testator domiciled in Ireland was entitled in England to priority, according to Irish law, in respect of assets which had been brought from Ireland to England. In *Pardo v. Bingham* (1869), L. R. 6 Eq. 485, an Englishman residing in Venezuela executed an instrument there to secure repayment to a creditor of a sum of money, and the creditor, having registered the instrument in the form prescribed by the law of Venezuela, became entitled, by that law, to be paid his debt out of the general assets of the debtor in priority to other creditors. The debtor died in Venezuela, but it did not appear

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(*k*) Westlake, Priv. Int. Law (1922), § 110, p. 134; Story, § 524.

(*l*) In *re Klæbe, Kannreuther v. Geiselbrecht* (1884), 28 Ch. D. 175, 180, reviewing *Cook v. Gregson* (1854), 2 Drew. 286; *Eames v. Hacon* (1881), 18 Ch. D. 347, C. A.; and *Blackwood v. R.* (1882), 8 App. Cas. 82, P. C.

(*m*) Cf. *Blackwood v. The Queen* (1882), 8 App. Cas. 82; *Enohin v. Wylie* (1862), 10 H. L. C. 1; *Simpson v. Fogo* (1860), 1 H. & M. 195. In *Hanson v. Walker* (1829), 7 L. J. Ch. 135, the *lex situs* as affecting immovables was involved.

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whether or not he had been domiciled there, and all that was decided was that the provisions of the *lex loci contractus* would not entitle a creditor to a priority not given by the law of the country where the assets were situated. It was suggested in the course of the argument that the deceased was probably domiciled in Venezuela, and that the Venezuelan law was entitled to be heard on that ground, but Lord Romilly refused to direct an inquiry as to this without a special application for that purpose, and gave no opinion as to the probable effect of such a fact, if it had been ascertained to exist. There does not, therefore, appear to be any authority for saying that a priority given by the law of the domicile of a testator or intestate will be disregarded. The argument in *In re Kløbe* (1884), 28 Ch. D. 175, which Pearson, J., rejected, was not an argument in favour of rights or priorities given by the *lex domicilii*, but the barefaced proposition that “foreign creditors have no right to prove or get payment in this country at all.” The answer of the Court was that the English law, as the *lex fori*, gives such a right to all creditors, “equally with other creditors in the same class.” How the question of class is to be determined is therefore (it is submitted) still left open; but there is no doubt that the tendency of the judgment in *In re Kløbe* is to refer to the *lex fori* all questions of the priority of creditors, as touching matters of *procedure*, a principle asserted in general terms by jurists (n), and recognised in English Courts as to distribution of assets under bankruptcy. In *In re Doetsch; Matheson v. Ludwig*, [1896] 2 Ch. 836, however, it was held that in a suit for administration of separate estate of an insolvent partner by foreign creditors, the plea that by foreign law the joint estate ought first to be exhausted was no defence. Romer, J., at p. 839, said: “Speaking generally, English assets have to be distributed according to English law—according to priorities recognised by Courts in this country.”

Priorities—
belong to
procedure.

Lex fori in
priorities in
bankruptcy.

In *Ex parte Melbourn (o)* a marriage contract settling personal estate on the wife had not been registered as required by the law of Batavia, where it was executed, and consequently was of no effect there as against third parties. The husband having subsequently become bankrupt in England, his wife claimed to prove against his estate for the sum settled, and her proof was admitted, on the general ground that the question of priority of creditors *inter se* must be governed by the law of the country where the bankruptcy takes place, and where the assets of the

(n) *De la Vega v. Vianna* (1830), 1 B. & Ad. 284; Story, § 323; Westlake, (1922), § 341, p. 404; Huber, tom. 2, lib. 1, c. 3.

(o) (1870), L. R. 6 Ch. 64; see, for the converse case, *Thurburn v. Steward* (1871), L. R. 3 P. C. 478.

debtor are being administered. In such a case the assets are of course regarded as being locally situate there, following the person of the bankrupt. The principle is perhaps best expressed in the words of Tenterden, C.J., in *De la Vega v. Vianna* (1830), 1 B. & Ad. 284 : "A person suing in this country must take the law as he finds it; he cannot, by virtue of any regulation in his own country, enjoy greater advantages than other suitors here, and he ought not therefore to be deprived of any superior advantage which the law of this country may confer."

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(iv.) ASSIGNMENT OF PERSONAL PROPERTY BY LAW ON BANKRUPTCY OR INSOLVENCY.

The transfer of personal property by alienation *inter vivos* and by succession by devise or *ab intestato* having been now considered, it becomes necessary to discuss the operation of the universal assignments which take place by operation of law upon the bankruptcy of the owner. The first question is, to what property of the bankrupt do these universal assignments to trustees or assignees for the benefit of his creditors extend? And this question must be regarded as quite apart from that which is apparently connected with it, as to the effect of a bankruptcy in one jurisdiction in discharging debts contracted in or sued for in the Courts of another, depending as it does upon entirely different principles. The latter question will be dealt with when the nature of obligations is discussed, and their inherent liability to discharge.

Movables—
Bankruptcy.

The question, then, being simply as to the view taken by English Courts of the effect of a bankruptcy in assigning the personal property of the bankrupt, it is obvious that two sorts of bankruptcies have to be considered. It must be seen, first, what effect English Courts attribute to an English bankruptcy; and, secondly, what to a foreign one, with regard to property situate both within and without the jurisdiction under which the assignment is made.

First, then, with regard to an English bankruptcy, by s. 38 of the Bankruptcy Act, 1914 (*p*), it is enacted that the property of the bankrupt divisible amongst his creditors (which is vested in the trustee by s. 53 of the same Act) shall comprise all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge (with certain exceptions in the previous sub-sections which are immaterial to this question), all powers in or over or in respect of property, and all goods and chattels being at the commencement of the bank-

Effect of
English
bankruptcy.
Bankruptcy
Act, 1914.

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—

Bankruptcy
jurisdiction
of English
Court.

ruptcy in the possession, order, or disposition of the bankrupt in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof; provided that *choses in action*, other than debts due to him in the course of his trade or business, shall not be deemed goods within the meaning of the section. It will be seen that there is thus no territorial limitation in the statute, which regards the actual situation of personal chattels as immaterial, on the principle of "*mobilia sequuntur personam*." As to real estate, s. 167 enacts that "property" is to include real or personal property, whether situate in England or elsewhere: but it has been already pointed out (*q*) that, as to real estate and chattels real, an assignment is good by the *lex situs* alone. This extensive operation of the statute as to personal chattels is in accordance with the view taken by English law; and it is well established in England that an English assignment in bankruptcy operates as a complete and valid transfer of all the personal chattels of the bankrupt, wherever they are situate (*r*). And this is so, in the contemplation of English law, whatever the domicile of the bankrupt.

By s. 1 (1) of the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), a debtor commits an act of bankruptcy in each of the following cases: (a) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally; (b) if in England or elsewhere he makes a fraudulent conveyance, gift, delivery or transfer of his property or of any part thereof; (c) if in England or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon, which would under this or any other Act be void as a fraudulent preference if he were adjudged bankrupt; (d) if with intent to defeat or delay his creditors he does any of the following things, namely, departs out of England, or being out of England, remains out of England, or departs from his dwelling-house or otherwise absents himself or begins to keep house; (e) if execution against him has been levied by seizure of his goods under process in an action in any court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days: Provided that where an interpleader summons has been

(*q*) *Supra*, p. 265. As to the effect of the Bankruptcy Act on land in the colonies, see per Jessel, M.R., in *Ex parte Rogers, Re Boustead* (1881), 16 Ch. D. 665; and *supra*, p. 266.

(*r*) *Phillips v. Hunter* (1795), 2 H. Bl. 402; *Sill v. Worswick* (1791), 1 H. Bl. 665; *Hunter v. Potts* (1791), 4 Tr. 182; *Wilson's Case* (1752), cited 1 H. Bl. 691; *Neal v. Cottingham* (1764), 1 H. Bl. 132, n.; *Ex parte Blakes* (1787), 1 Cox, 398; *Banco de Portugal v. Waddell* (1880), 5 App. Cas. 161; *Re Hayward*, [1897] 1 Ch. 905.

taken out in regard to the goods seized, the time elapsing between the date at which such summons is taken out and the date at which the proceedings on such summons are finally disposed of, settled or abandoned shall not be taken into account in calculating such period of twenty-one days; (f) if he files in the Court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself; (g) if a creditor has obtained a final judgment or final order against him for any amount, and, execution thereon not having been stayed, has served on him in England, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, and he does not, within seven days after service of the notice in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the Court that he has a counterclaim, set-off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or the proceedings in which the order was obtained: For the purposes of this paragraph and of s. 2 of this Act, any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order; (h) if the debtor gives notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts.

By s. 107 (4), where an application for a committal order is made by the judgment creditor and the Court makes a receiving order, the judgment debtor is deemed to have committed an act of bankruptcy at the time the order is made (s).

The jurisdiction under the Bankruptcy Acts has been extended by s. 1 (2) of the Bankruptcy Act, 1914, to include any person whether a British subject or not, who at the time when any act of bankruptcy was done or suffered by him, (a) was personally present in England; (b) or ordinarily resided or had a place of residence in England; (c) or was carrying on business in England personally or by means of an agent or manager; (d) or was a member of a firm or partnership which carried on business in England.

But by s. 4 (1), a creditor is not entitled to present a bankruptcy petition unless (a) the debt owing by the debtor to the petitioning creditor or if two or more creditors join in the petition, the aggregate amount of debts owing to the several petitioning creditors, amounts to £50, and (b) the debt is a

(s) Re-enacting s. 5 of the Debtors Act, 1869, 32 & 33 Vict. c. 62.

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liquidated sum, payable either immediately or at some certain future time, and (c) the act of bankruptcy on which the petition is grounded has occurred within three months before the presentation of the petition, and (d) the debtor is domiciled in England, or within one year before the date of the presentation of the petition has ordinarily resided or had a dwelling-house or place of business in England, or (except in the case of a person domiciled in Scotland or Ireland or a firm or partnership having its principal place of business in Scotland or Ireland) has carried on business in England personally or by means of an agent or manager, or (except as aforesaid) is, or within the said period has been, a member of a firm or partnership of persons which has carried on business in England by means of a partner or partners or an agent or manager.

The effect of s. 1 (2), says Mr. Baldwin, would appear to be that a foreigner domiciled abroad may, if he falls within the sub-section, now commit an act of bankruptcy abroad under s. 1, sub-s. 1 (a), (b), (c) or (h), which will be available against him in adverse bankruptcy proceedings in this country. It would, however, seem very doubtful whether an effective bankruptcy notice can be served abroad upon a foreigner domiciled abroad, as he does not appear to be a "debtor" within s. 1 (2) at the time of the service, nor indeed until seven days afterwards.

Some also of the acts of bankruptcy within s. 1 (1) (d) appear to be in a different category from those in s. 4 (1) (d). It is clear, says Mr. Baldwin, that despite the increased jurisdiction now given over foreigners with a business in this country, the same inference cannot be drawn of intent to defeat or delay creditors under this sub-section in the case of a domiciled foreigner as if he were a domiciled Englishman. By s. 4 (1) (d), no creditor's petition can be presented against a debtor unless the debtor is domiciled in England, etc. The generality, therefore, of s. 1 (2) is controlled, so far as a creditor's petition is concerned, by the exceptions as to a domiciled Scotsman or Irishman carrying on business in Scotland or Ireland. If the foreigner is a "debtor" as above defined, it is immaterial that the debt was incurred abroad. In *Ex parte Pascal, Re Meyer* (1875), 1 Ch. D. 509, for instance, it was held that a foreigner could take out a debtor's summons against another foreigner who happened to be at the time in England, in respect of a debt contracted abroad. It is also immaterial that at the date of the presentation of the petition against him the foreigner was out of the jurisdiction. Thus in *Ex parte Crispin* (1873), 8 Ch. 374, it was decided that an alien non-trader, domiciled abroad, who contracts debts in England may be made a bankrupt in England

under the Bankruptcy Act, 1869, provided that an act of bankruptcy has been committed in England, although he may have left England before the petition for adjudication is presented. But it was held in *Cooke v. C. A. Vogeler Co.*, [1901] A. C. 102, that the English Court had no jurisdiction to make an adjudication of bankruptcy against a foreigner domiciled and resident abroad, who had never been in England, though he might have traded and contracted debts in England by agents, servants or partners. Consequently an order for service of a petition abroad was refused.

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The obvious aim, says Dicey, of s. 4 (1) is to impose some restrictions on the creditor's right to present a petition against a debtor, even in cases where the debtor is obviously within s. 1 (2), *i.e.*, even when the debtor is obviously under the Bankruptcy Act, 1914, a person properly subject to the English bankruptcy law. It appears at first sight as if s. 4 (1) added to the qualifications which ought to be found in a "debtor" as defined in s. 1 (2) the further qualification that such debtor should be domiciled in England. The object of sub-sections (1) and (2) taken together is to ensure that the Court shall not adjudicate bankrupt any person unless he in strictness fall within the definition of a "debtor" and also shall have committed an indubitable act of bankruptcy. The object of s. 4 (1) is not further to define the meaning of the word "debtor" but to ensure that no creditor shall be entitled to present a petition unless he fulfils the conditions specified in s. 4 (1) and unless the debtor is domiciled in England, etc. The most practical result, says Dicey, of s. 4 (1) is that a creditor may not present a petition against a debtor merely because the debtor has committed an act of bankruptcy while present on a passing visit in England (t).

The definition of a debtor, says Mr. Bentwich, is somewhat wider than the class of debtor against whom a creditor can proceed. A foreigner can be made a bankrupt in England on his own petition, provided only that he was present in England when the act of bankruptcy was committed by him (u).

It should be noted that *Ex parte Crispin* (1873), *supra*, and *Ex parte Blain, Re Sawers* (1879), 12 Ch. D. 522, were decided before the Bankruptcy Act, 1883, but they are still authorities for the proposition that under that enactment, re-enacted by the Act of 1914, an act done by a foreigner can be an act of bankruptcy only if done within the jurisdiction of the Court. The term "foreigner" is presumably to be understood in relation to domicile and not to nationality.

(t) Conflict of Laws, 1922, p. 321-2. (u) Priv. Int. Law, 1922, § 128.

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So, under the older statutes, it was held that the essential requisite to make an act of bankruptcy cognisable in our Courts was that it should have been committed in England (*x*). In *Phillips v. Hunter* (1795), 2 H. Bl. 402, it was said that no foreign residence—*i.e.*, domicile—could exempt an English subject from the operation of the bankruptcy laws, whether such residence was temporary or permanent; but the question of nationality appears now to be immaterial for this purpose, much less weight being now given to it in such matters than was formerly the case. Where the debtor's English domicile is relied on and disputed, it is on the petitioning creditor that the onus of proving it lies (*y*).

Where, however, service of English process, whether under the Debtors Act, 1869, or under the Bankruptcy Act, is actually effected within this country, the jurisdiction appears to be limited only by the statutes under which procedure is taken. Thus in *Ex parte Pascal, Re Meyer* (1876), 1 Ch. D. 509, it was held that a foreigner who has committed an act of bankruptcy in England may be proceeded against under the Bankruptcy Act by another foreigner in respect of a debt contracted abroad. It was contended on behalf of the bankrupt that though his transient presence in England would make him liable to a common law action in respect of the debts contracted abroad (*z*), yet it did not render him subject to the service of a debtor's summons under the Bankruptcy Act, for which the same jurisdiction was necessary as in cases of actual adjudication (*a*). Mellish, L.J., however, expressed his opinion that transient presence and the commission of an act of bankruptcy in England were sufficient to found jurisdiction under the Bankruptcy Act, 1869, whether for the service of a debtor's summons simply, or for petition and adjudication. And if a bankruptcy notice, based on an English judgment, is duly served upon a foreigner transiently present in England, it is no sufficient objection that at the date of the issuing of the notice, the foreigner had not yet come within the jurisdiction. Upon a notice so served, and subsequent default, there would seem to be no reason (apart from statute) why the debtor should not be afterwards adjudged bankrupt; but by s. 4 (1) of the Bankruptcy Act, 1914, it is made a condition precedent to the jurisdiction that the debtor should either be domiciled in England, or should have ordinarily resided, or had a dwelling-house, or place of business, in England

(*x*) *Ex parte Smith* (1737), Cowp. 402; *Inglis v. Grant* (1794), 5 T. R. 530; *Norden v. James*, Dick. 533.

(*y*) *Ex parte Cunningham, Re Mitchell* (1884), 13 Q. B. D. 418; *Re Barne* (1886), 16 Q. B. D. 522.

(*z*) *Jackson v. Spittall* (1870), 5 C. P. 542.

(*a*) *Ex parte O'Loughlen* (1871), 6 Ch. 406, 410.

within a year before the date of the presentation of the petition. The jurisdiction to entertain a bankruptcy petition, therefore, founded upon a notice served under circumstances like those in *In re Clark, Ex parte Beyer*, [1896] 2 Q. B. 476, will be confined to cases in which this condition is satisfied. But a receiving order under s. 107 (4) of the Bankruptcy Act, 1914, is not limited in the same way, and it was held in *In re Clarke, Ex parte Clarke*, [1898] 1 Q. B. 20, that it might be made against a foreigner who has been duly served in England, although the condition of s. 4 (1) as to domicile, residence, dwelling-house, or place of business, is not complied with.

By the earlier Bankruptcy Consolidation Act of 1849 (s. 277) foreigners who were traders were expressly made subject to the banking laws, and under this and the older statutes it was decided that foreign residence was immaterial (b). The decisions in *Ex parte Crispin* and *Ex parte Pascal* show clearly that the question of domicile need not now be regarded, although Story seems to consider it as the basis of the principle now under discussion. It may, of course, be an important element of fact in considering whether an act of bankruptcy has been committed within s. 1 (1) (d) of the Act of 1914: "If with intent to delay or defeat his creditors he . . . departs out of England, or being out of England remains out of England, or departs from his dwelling-house, or otherwise absents himself, or begins to keep house." But in *Ex parte Brandon* (1884), 25 Ch. D. 500, where a debtor had a *bona fide* foreign residence, though retaining an English domicile, it was held that he did not come within this sub-section by merely returning to and remaining in his foreign residence. There must be something to show an intention to delay and defeat creditors (c).

It has been held that transient presence will render a foreign debtor liable to service of a bankruptcy notice based on an English judgment, although at the time of the issue of the notice the debtor had not come within the jurisdiction (d). Upon a notice so served, and default made, there seems no reason in principle why the debtor should not afterwards be adjudged bankrupt; but by s. 4 (1) of the Bankruptcy Act, 1914, it is made a condition precedent to adjudication that the debtor should either be domiciled, or should have ordinarily resided or had a place of business or dwelling-house, in England, within a year before the date of the presentation of the petition. The

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residence.

(b) *Alexander v. Vaughan* (1776), Cowp. 398; *Allen v. Cannon* (1821), 4 B. & A. 418; *Ex parte Smith* (1737), Cowp. 402; *Williams v. Nunn* (1814), 1 Taunt. 270.

(c) *Ex parte Langworthy* (1887), 3 T. L. R. 544. Cf. *Ex parte Gutierrez* (1879), 11 Ch. D. 298; *In re Campbell* (1887), 4 Morell, 198.

(d) *In re Clark*, [1896] 2 Q. B. 476.

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judicial
process—
effect of.

jurisdiction to entertain a petition, therefore, founded upon a notice served by means of transient presence, will be confined to cases in which this condition is satisfied. But a receiving order under s. 107 (4) of the Bankruptcy Act, 1914, may be made in such a case, although the condition as to residence, dwelling-house or place of business is not satisfied (e). It is obvious that this distinction turns entirely on the language of the English statute, and does not depend upon principle.

English Courts, then, will regard the title of the trustee in an English bankruptcy to personal property situate abroad as complete, but the question assumes a slightly different form where this title has already been disregarded by a foreign Court, and a creditor of the bankrupt has possessed himself, by foreign judicial process, of the foreign property. Where such creditor is domiciled in England and has notice of the English bankruptcy, the assignees have been held entitled to recover the proceeds he had thus appropriated in an action for money had and received (f), but appear to have no right of action against a foreign garnishee, who has paid a debt due to the bankrupt estate to the creditor under or in expectation of the compulsion of a competent jurisdiction (g). From the judgments in *Sill v. Worswick* and *Phillips v. Hunter*, *supra*, Westlake deduces, first, that the title of the assignees ought to be preferred to that of any creditor by a foreign Court, if intimated to it *pendente lite*, and, secondly, that if it is disregarded by it, an English creditor, but not a foreign one, will be compelled in an English Court to yield the proceeds he has acquired abroad to the English assignees (h). The distinction drawn between an English and a foreign creditor is clearly one of nationality in the authorities on which this proposition is based; but Westlake, though speaking of an "Englishman" and "an English creditor," uses language that would lead to the belief that the English domicile is or should be the distinguishing test. The distinction between domicile and nationality was not so clearly marked at the end of the last century, when those cases were decided, as it is at present, and it is certainly difficult to see now in what sense an English subject who has acquired a foreign domicile, remains subject to the English bankruptcy law with regard to his acts done abroad, so as to be bound by an assignment under it of the property of an

(e) *In re Clark*, [1898] 1 Q. B. 20. On the somewhat analogous case of the jurisdiction to wind up companies, see Part I, Cap. v., *supra*.

(f) *Hunter v. Potts* (1791), 4 T. R. 182; *Phillips v. Hunter* (1795), 2 H. Bl. 402; *Sill v. Worswick* (1791), 1 H. Bl. 665; *Ex parte Scinde Ry. Co.* (1874), L. R. 9 Ch. 557.

(g) *Le Chevalier v. Lynch* (1779), Dougl. 170; *Cleve v. Mills*, Cock. 1764; *Allen v. Douglas*, 3 T. R. 125.

(h) Priv. Int. Law (1922), § 143.

English bankrupt any more than other people. If the creditor was domiciled in England, and so subject to its laws, the case would be very different, but even then there appears no authority in the cases cited for saying that he would be compelled to refund, if the foreign Court, after due notice of the title of the assignees, had pronounced judgment in his favour. All that is said is that no foreign Court respecting the comity of nations ought to pronounce such a judgment, but that a creditor who recovers in such a way, and is not subject to the bankrupt laws of England nor affected by them (whatever that may mean), can certainly not be compelled to refund, if sued by the assignees. The validity of such a judgment if pronounced, being in a certain sense *in rem* (i), can hardly on general principles be questioned, at any rate as between the parties to it.

Where there has been no judgment pronounced by the foreign Court, but a creditor has merely obtained possession, by foreign attachment of the bankrupt's property, it is clear from the later case of *Selkrig v. Davis* (k) that whether there has been a formal intimation to the garnishee or not of the bankruptcy, the creditor can take nothing by such diligence, and if he can be reached by the English Court, will be compelled to refund. If he is neither present within the jurisdiction, nor has property within it, nor comes before the English Court of Bankruptcy to prove for other debts due to him in excess of the value of what he has acquired by the foreign process (l), it is plain that he cannot be reached or in any way obliged to disgorge. But where a bankrupt estate is being administered in England, and the foreign estate of the same debtor or debtors is also the subject of a bankruptcy abroad, creditors who have received a dividend under the foreign bankruptcy will not be allowed to prove in the English bankruptcy unless they bring in what they have received abroad (m). Substantially the same rule had been laid down under the Bankruptcy Act of 1861 (n). Nor will a foreign creditor be allowed to make any use of a judgment obtained abroad pending English administration; though he will not be restrained from proceeding to obtain such judgment in his own country (o). And in the case of a foreign judgment *in rem*, based on and declaring the existence of a prior lien in the creditor's favour, on

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(i) Story, § 592; *McDaniell v. Hughes* (1803), 3 East, 367; *Cammell v. Sewell* (1858), 29 L. J. Ex. 350.

(k) (1814), 2 Rose, 291; S. C. 2 Dow. 230. See also *Royal Bank of Scotland v. Cuthbert* (1813), 2 Rose, 78; *Smith v. Buchanan* (1800), 1 East, 6.

(l) As in *In re Oriental Inland Steam Co., Ex parte Scinde Ry. Co.* (1874), 9 Ch. 557.

(m) *Banco de Portugal v. Waddell* (1880), 11 Ch. D. 522; S. C. 5 App. Cas. 161.

(n) *Ex parte Wilson* (1872), 7 Ch. 490.

(o) *In re Boyse, Crofton v. Crofton* (1880), 49 L. J. Ch. 699.

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the assets with which it deals, it was held that the liquidator in an English winding-up could not recover the proceeds from the creditor (*p*). In the case just cited the creditor was not proving in the English winding-up, but it does not appear that his position would have been altered if he had been. The same principle is illustrated by *Ex parte Dobree* (1803), 8 Ves. 82, where the only real dispute was whether the foreign attachment was complete, so as to vest the property attached, before the English bankruptcy or not. Where the bankrupt was a partner in a firm trading and having assets both in England and in the West Indies, and after the English bankruptcy a creditor of the firm attached a debt due to the firm in the West Indies, it was held that the assignees could not compel him to refund the proceeds thus obtained (*q*), the principle being apparently that the English bankruptcy could not affect the partnership assets situate abroad, as against the foreign creditors and the foreign partners. The ordinary rule applicable to the bankruptcy of a partner being that the partnership is dissolved, and that the trustee in the bankruptcy becomes tenant in common with the other partners of the partnership property, who retain their authority to deal with the business in order to wind it up, the decision of Sir W. Grant in the case just referred to appears to have been correct. But if the partners in the foreign firm are the same as those in England, and both firms are bankrupt, a mere difference in the firm name will not let in a double proof (*r*).

Concurrent
bankrupt-
cies.

The question of concurrent and competing bankruptcies in different countries is one which has often given rise to difficulty. The general rule has been stated as being that the country of the domicile is the preferable *forum*, and that if it is necessary that there should be but one proceeding in bankruptcy, that proceeding should be in the country of the domicile (*s*). It would therefore seem that in a proper case, where the bankrupt's domicile was foreign, and bankruptcy proceedings were pending in that country, an English bankruptcy might be stayed, though commenced with jurisdiction. There is no instance when this has been done in fact, though the possibility of such a course being taken is assumed by the language of Lord Coleridge, C.J., in *In re Artola Hermanos, Ex parte Châle* (1890), 24 Q. B. D.

(*p*) *Minna Craig Steamship Co. v. Chartered Bank of India* (1897), 66 L. J. Q. B. 162; distinguishing *In re Oriental Inland Steam Co.* (1874), 9 Ch. 557.

(*q*) *Brickwood v. Miller* (1817), 3 Mer. 279; *Waring v. Knight* (1765), cited in *Phillips v. Hunter* (1795), 2 H. Bl. 410.

(*r*) *Banco de Portugal v. Waddell* (1880), 11 Ch. D. 522; S. C. 5 App. Cas. 161.

(*s*) *Smith v. Buchanan* (1800), 1 East, 6; and cf. *Bartley v. Hodges* (1861), 1 B. & S. 375. *In re Blithman* (1866), 2 Eq. 23, and *In re Davidson's Trusts* (1873), 15 Eq. 383.

640, where a firm with head offices in Paris and a branch in England, three of the partners residing in Paris and two in London, was declared bankrupt in Paris and a syndic appointed. The Court of Appeal refused to stay the English bankruptcy proceedings on the application of the syndic. Since there were assets within the jurisdiction, it was held that a receiving order was properly made and that the fact that a prior bankruptcy had been commenced in a foreign country not shown to be the country of the domicile of the debtors, was no ground for staying the proceedings here. But in the case of a bankruptcy petition in England against a debtor residing (whether domiciled or not appears doubtful) in Scotland, it has been held that the existence of a pending Scotch sequestration is *prima facie* a reason for refusing to make an adjudication in England, though there was jurisdiction to do so (*t*). If the discretion of the Court in such a case will be exercised by refusing to commence bankruptcy proceedings in England, there seems no reason why in a proper case it should not be exercised by discontinuing or staying English bankruptcy proceedings which have been already commenced.

It is pointed out by Fry, L.J., in the case of *Re Artola Hermanos*, that there are three possible views of the duty of the Court on such an application. The first is, that where there are concurrent bankruptcies each *forum* is to administer the assets locally situated within its jurisdiction, each *forum*, of course, allowing all the creditors to prove, but applying the doctrine of hotchpot, so as to produce so far as may be equality. That each *forum* has jurisdiction to do this there can be little doubt, as in the analogous case of administration on intestacy (*u*); but the question would rather seem to be, whether the jurisdiction ought to be exercised in this manner, or whether (as already suggested) an English bankruptcy ought not to be stayed where the *forum* of the bankrupt's domicile has already commenced similar proceedings for a like purpose.

The second suggested rule considered by Fry, L.J., is that every other *forum* shall yield to the *forum* of the domicile, and that the forum of every other country shall act only as accessory to and in aid of the *forum* of the domicile—that being the *forum concursus*, to which all persons interested in the administration of the estate are bound to come. “No doubt there is a great deal in point of law and principle to be said in favour of that

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(*t*) *Re Robinson* (1883), 22 Ch. D. 816, citing *Ex parte McCulloch* (1880), 14 Ch. D. 716, on the question of jurisdiction. So leave to serve a writ in Scotland was refused in the somewhat analogous case of the administration of a trust (*Cresswell v. Parker* (1879), 11 Ch. D. 601).

(*u*) *Ewing v. Orr-Ewing* (1883), 9 App. Cas. 34.

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view, and there are certainly some conveniences in it." It cannot, however, be said that this rule has without qualification been accepted; and probably it would be safer to say that *cæteris paribus*, the *forum domicilii* has and ought to have the preference.

The third suggested rule, which would give priority to the *forum* in which bankruptcy proceedings were first commenced, irrespective of domicile, provided that there were assets within its jurisdiction, need not be seriously considered, as it has never met with acceptance, and is described by Fry, L.J., "as an entirely unreasonable one."

By s. 12 of the Bankruptcy Act, 1914, the Court may rescind a receiving order when it appears that a majority of the creditors in number and value are resident in Scotland or Ireland and that, from the situation of the property or other causes, it ought to be distributed under the law relating to bankruptcy in Scotland or Ireland.

But when a bankruptcy notice had been issued and served upon the debtor requiring payment of a judgment debt and the debtor, before the expiration of the time fixed for compliance with the notice, obtained upon his own petition an order of sequestration in Scotland, whereby all his assets became vested in the Scottish trustees, it was held by the Court of Appeal that the English Courts had jurisdiction to make a receiving order notwithstanding the sequestration, and, there being assets and creditors in England, such an order was properly made: *In re A Debtor*, [1922] 2 Ch. 470.

Effect of
foreign
bankruptcy.

The effect of an English bankruptcy upon personal chattels of the bankrupt situate abroad has been shown above. As to the operation of a foreign bankruptcy in England, the same universal effect of such an assignment that the English law claims for bankruptcies declared by itself is conceded by it to those which result from the laws of foreign countries. Accordingly, it is settled that an assignment by a foreign bankruptcy passes all the personal property of the bankrupt situate in England, including *choses in action* (x). *Re Blithman* (1866), 35 Beav. 219, is perhaps a little inconsistent with this doctrine, Lord Romilly holding that the question whether or not an Australian insolvency applied to personalty in England depended upon the domicile of the insolvent, who had died since the adjudication, and that if his domicile was English, and an Australian domicile had not been acquired, the title of his English executrix must

(x) *Solomons v. Ross* (1764), 1 H. Bl. 131, n.; *Tollett v. Deponthieu*, *ibid.* 132, n.; *Potter v. Brown* (1804), 5 East, 124; *Ex parte Cridland*, 3 V. & B. 94.

prevail. It does not appear to have been quite clear whether Lord Romilly considered that it was the domicil at the time of the adjudication of insolvency or that at the time of the death which ought to be regarded, as he uses expressions consistent with either view, and mutually contradictory in his judgment; but it is submitted that as the English bankrupt law does not require an English domicil to found its jurisdiction, so it should recognise foreign insolvencies and bankruptcies without inquiring whether the subject of them was or was not domiciled in the country where his bankruptcy or insolvency was declared; and this view seems to be supported by the judgment of James, L.J., in *In re Davidson's Settlement Trusts* (1873), 15 Eq. 383. And though it is of course established law that the personal estate of a testator or intestate shall be distributed according to the law of his domicil, yet, in the first place, the Australian assignment under the insolvency in the case of *Re Blithman* ought to have been held operative on the English property by English law, as part of the law of nations, and not merely by the Australian statute; and secondly, if it operated at all, it did so at once, so that at the time of the death the English property belonged to the assignees under the insolvency, and was not part of the estate of the deceased for purposes of succession at all. Where the foreign bankruptcy is pending, and the bankrupt, without having obtained his discharge under it, is adjudicated bankrupt on a new petition in England, it would seem on principle that there should be no distinction between such a case and a case where both the bankruptcies are English. In such an event it was decided in *Morgan v. Knight* (1864), 33 L. J. C. P. 168, prior to the Bankruptcy Act of 1869, that the Court would support the title of the assignees under the later bankruptcy, against those under the earlier one in respect of property acquired between the two bankruptcies, but not, of course, in respect of that which the bankrupt had previously held. If the circumstances are such that it is desirable that one bankruptcy only should be proceeded with, as pointed out at p. 343, the authorities are in favour of giving the preference to the *forum domicilii*.

All the property of the foreign bankrupt being vested in his assignees, they become of course entitled to his *choses in action*, for which they may have to come to English Courts, and their right to sue there in their own names depends, in the first place, upon the original negotiability or liability to assignment of the obligation which it is sought to put in force. If the obligation was negotiable or assignable in its inception, then the assignees

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may sue in their own names (y), the question not being then of the remedy available, which is a matter for the *lex fori* (z), but of the nature of the contract. If, on the other hand, the *choses in action* is an ordinary debt, the assignees are not, according to the view best supported, entitled to sue on it in their own names (a). In the case of *Alivon v. Furnival* (1834), 1 C. M. & R. 277, the point was not distinctly raised. There the bankrupt, prior to his bankruptcy and the appointment of provisional syndics in France, had become the creditor of the defendant on a French award and judgment, and the contest was rather whether two of the syndics were entitled to sue in their own names by the law of France, than whether the English law as to the non-assignability of obligations was to prevail. *O'Callaghan v. Thomond* (1810), 3 Taunt. 81, where the assignee of an Irish judgment, made assignable by an Irish statute, was held entitled to sue in his own name, was not cited, but the Court were perhaps entitled to apply the principle of that case, the debt being on a French judgment. Parke, B., in his judgment, treated the plaintiffs not strictly as assignees of the creditor's *choses in action*, but as mandatories or agents for the creditors under the French bankrupt law. In *Smith v. Buchanan* (1800), 1 East, 6, Lord Kenyon said the English law so far gave way to foreign laws of bankruptcy that assignees of bankrupts deriving title under foreign ordinances were permitted to sue here for debts due to the bankrupt's estate; but that *dictum*, if it meant that such assignees were entitled to sue in their own names, is certainly inconsistent with the later cases already cited (b), and considerable doubt is thrown by Story, § 565, on the decisions in the two cases mentioned above. The general principle that an obligation not assignable in its inception cannot be sued for by an assignee, either for valuable consideration or under a bankruptcy, in a form which does not recognise the ordinary assignment of *choses in action*, appears to be strictly analogous to the rule as to debts due to the estate of a testator or intestate, which requires the personal representative to perfect his title according to the *lex fori*, by taking out administration in his own name, before he can recover them by suit.

By the Judicature Act, 1873, s. 25 (6), it is enacted that any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or

(y) *Jeffery v. McTaggart* (1817), 6 M. & S. 126; *Wolff v. Oxholme*, *ibid.* 99.

(z) *Infra*, chap. x.

(a) *Wolff v. Oxholme* (1817), 6 M. & S. 92, 99.

(b) *Jeffery v. McTaggart* (1817), 6 M. & S. 126; *Wolff v. Oxholme*, *ibid.* 92; *Folliott v. Ogden* (1789), 1 H. Bl. 131.

other legal *choses in action*, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or *choses in action*, shall be, and be deemed to have been, effectual in law (subject to prior equities) to pass and transfer the legal right to such debt or *choses in action* from the date of such notice, and all legal and other remedies for the same. It would therefore seem that the assignees under a foreign bankruptcy could now obtain a clear title to sue in their own names for *choses in action* of the bankrupt in England, by calling upon him to execute to them such written assignment as the section just quoted contemplates, and giving the required notice to the garnishee. This distribution of assets under a bankruptcy is entirely a matter for the *lex fori*, under the authority of which the bankrupt has been adjudicated and distribution ordered. Thus, all questions of the priority of creditors must be determined by the law of the country where the bankruptcy takes place (*c*), and the question whether or not a creditor's claim is capable of proof at all must be referred to the same test (*d*). And where double proof against the estates of two bankrupt firms is not allowed by English law, the fact that the first bankruptcy under which the creditor has proved was in Brazil will not render his proof admissible under the bankruptcy in England (*e*). It should be remarked, however, that in this case the bills which it was desired to make the subject of the proof had been accepted in England, so that the English law might have been applied as that of the place where the contract was to be performed (*f*). Moreover, a foreign creditor, residing out of the jurisdiction of the Court of Bankruptcy, who comes in and proves his debt in an English bankruptcy or liquidation, brings himself thereby within the general jurisdiction of the Court as to the administration of the estate just as if he were residing within it; so that an order can be made upon him to restore property of the bankrupt or debtor improperly in his possession (*g*). It would seem that the mere fact of a foreign assignee being present in England with assets in his hands will not warrant an English Court in assuming to control his management of the estate, at any rate unless it is sufficiently shown that the bankrupt has failed to obtain justice in the ordinary Courts of the country where the bankruptcy took place (*h*). And the

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(*c*) *Thurburn v. Steward* (1871), 3 P. C. 478; *Pardo v. Bingham* (1869), 6 Eq. 485.

(*d*) *Ex parte Melbourn* (1870), 6 Ch. 64.

(*e*) *Ex parte Goldsmid* (1856), 7 H. L. C. 785; S. C. 1 De G. & J. 257.

(*f*) See judgment of Turner, L.J. (1856), 1 De G. & J. 285, and *Don v. Lippmann* (1837), 5 Cl. & F. 1.

(*g*) *Ex parte Robertson, Re Morton* (1875), 20 Eq. 733.

(*h*) *Smith v. Moffatt* (1865), 1 Eq. 397.

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fact that a creditor in an administration suit has obtained an advantage by means of a foreign attachment upon foreign assets, in respect of a debt barred by the English Statute of Limitations, but not by the foreign law, will not be a reason why an English Court should call upon him to account for these proceeds or bring them into hotchpot when he is proving under the English administration for another debt (*i*). But it has already been shown that, where the estate of the same debtor is being administered both in England and abroad, a creditor who has received a dividend under the foreign bankruptcy will not be allowed to prove in England without bringing in what he has received (*k*).

So far as bankruptcies in Courts which are British though not English are concerned, the trustee's power of reaching movables within one of the sister jurisdictions is reinforced by s. 122 of the Bankruptcy Act, 1914, which directs the officers of English, Scotch, Irish, and other British Courts to act in aid of each other. In *In re Firbank; Ex parte Knight*, 4 Morell, 50, an order was made in England under the corresponding s. 118 of the Act of 1883 in aid of the Court of the Cape of Good Hope.

(V.) ALIENATION OF MOVABLE PERSONAL PROPERTY BY
MARRIAGE.

Assign-
ments on
marriage—
lex domicilii.

The last species of assignment by which personal property is transferred is that universal assignment which results from the marriage of the owner when a woman, and is regulated by the law of the matrimonial domicile—*i.e.* the domicile of the husband at the time of the celebration of the marriage. Story cites for this the words of Lord Meadowbank in *Royal Bank of Scotland v. Cuthbert* (1813), 1 Rose, App. 481: "When a lady of fortune having a great deal of money in Scotland, or stock in the banks of public companies there, marries in London, the whole property is *ipso jure* her husband's. It is assigned to him. The legal assignment of a marriage operates without regard to territory all the world over." It is obvious, however, that this language is just as applicable to the *lex loci celebrationis* as to the *lex domicilii*, and it is extremely probable that the learned judge was confounding the two laws, the case before him being that of an English adjudication of bankruptcy against a firm carrying on business both in Edinburgh and in London, and whose domicile for the purposes of the case was considered as being in both countries equally. The principle of the *lex domicilii*, however,

(i) *In re Bowes, Strathmore v. Vane* (1889), W. N. 53.

(k) *Banco de Portugal v. Waddell* (1880), 11 Ch. D. 522; S. C. on appeal, 5 App. Cas. 161; *Ex parte Wilson* (1872), 7 Ch. 490.

is regarded by all writers as firmly established (l); and has been recently recognised in the case of *Loustalan v. Loustalan*, [1900] P. D. 211, where, though the Court of Appeal differed as to the true domicile of the husband at the date of the marriage, they agreed that the law of that domicile must prevail. In this special case, it was applied so as to render null and void a prenuptial will executed by the woman, a Frenchwoman, according to French law. The peculiar provision of English law which regards all wills as revoked by marriage, was considered by the Court of Appeal as belonging to the law matrimonial, rather than to the law testamentary.

The law of the matrimonial domicile is also that which is strictly applicable to marriage settlements of personal property as between husband and wife, yet this statement is not to be accepted without qualification. The intention of the parties may be so manifestly in favour of applying some other law, that the *lex domicilii* cannot be applied without defeating that intention. This was the case in *Van Grutten v. Digby* (m) (1862), 31 Beav. 561, when a settlement made in France on a marriage between a domiciled Frenchman and an Englishwoman (apparently) domiciled in France, relating to property in England and with English trustees, was supported, though invalid by French law for want of compliance with the *lex loci*.

The law of the matrimonial domicile will govern the rights of either the husband or the wife, as regards property acquired after the marriage (n), where there is no pre-existing settlement or contract providing for its disposition. Where a marriage has been dissolved by the Courts of the matrimonial domicile, the proprietary rights of the husband and wife *inter se* upon the dissolution are regulated by the *lex domicilii* (o).

The law of the matrimonial domicile will not prevail as against creditors when the husband is afterwards adjudicated bankrupt in another competent jurisdiction, but the law there in force will prevail. As was said by Lord Cairns in *Thurburn v. Steward* (1871), 3 P. C. 513, in a distribution of assets in a *concurso* of creditors, the proper order and priority of distribution is always a matter for the *lex fori* where the distribution takes place, and does not at all interfere with the principle that the law of the matrimonial domicile at the time of the marriage regulates the rights which husband and wife acquire in each

(l) Cf. Story, § 423; Westlake, Priv. Int. Law (1922), § 36.

(m) Cf. *Viditz v. O'Hagan*, [1900] 2 Ch. 87. As to the effect of a post-nuptial change of domicile, see *infra*, p. 355. *De Nichols v. Curlier*, [1900] App. Ca. 21. *Lashley v. Hog* (1804), 4 Paton, 581.

(n) *Sawer v. Shute* (1792), 1 Anst. 63; *McCormick v. Garnett* (1854), 5 De G. M. & G. 278.

(o) *Swaagman v. Swaagman* (1908), *Times*, Feb. 17.

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Conflict
between
lex loci
and *lex*
domicilii.

other's personal property. By placing himself within the reach of a foreign bankrupt law, the husband in *Thurburn v. Steward* rendered himself and his wife liable to the operation of that law upon all the rights that had become vested in them at the time of their marriage. The reverse case occurred in *Ex parte Melbourn* (1870), 6 Ch. 64, where the matrimonial domicile was foreign, and the bankruptcy occurred in England. On the same principle, which was the ground of the decision in *Thurburn v. Steward*, the wife was allowed in the case last mentioned, following the English law, to prove for a sum agreed to be settled upon her, though the law of Batavia, where the parties were domiciled and the settlement was made at the time of the marriage, rendered the contract of settlement invalid, as against creditors, for want of registration. Nor is the law of the matrimonial domicile necessarily that which regulates the interpretation and construction of settlements of personal property made on marriage. In interpreting ambiguous or technical expressions, the domicile of the parties is an element which ought to be taken into consideration (*p*), but where there is no expression of a contrary intention, a marriage settlement, like an ordinary contract, is to be interpreted according to the law of the country where it is executed (*q*). In the words of Story, the general rule is in no case more firmly adhered to than in cases of nuptial contracts and settlements—that written agreements are to be construed and enforced according to the *lex loci contractus* (*r*). In most of the cases, however, the place of the matrimonial domicile is also that where the settlement is executed, and a conflict between the two laws does not arise. In *Anstruther v. Adair* (*s*) (1834), 2 My. & K. 513, the domicile of the parties was Scottish, and an ante-nuptial contract, affecting the personalty which was the subject-matter of the suit, had been entered into in Scotland. In holding that the contract must be governed by the Scottish law, Lord Brougham said nothing to indicate whether the law was adopted as being *lex domicilii* or *lex loci contractus*, but rested his judgment solely on the ground that the intention of the parties would be defeated if the Scotch law was not followed. Westlake now says that it would be more correct to say that the legality and operation of a marriage settlement or contract, and generally its interpretation, are referred to the law which is judged, from all the circumstances of the

(*p*) *Lansdowne v. Lansdowne* (1820), 2 Bligh, 60, 87.

(*q*) *Holmes v. Holmes* (1830), 1 Russ. & My. 660; *Lansdowne v. Lansdowne*, 2 Bligh, 60; *Trimbey v. Vignier* (1834), 1 Bing. N. C. 151, and *infra*, chap. viii. (ii).

(*r*) Story, § 276.

(*s*) See *Warrender v. Warrender* (1835), 2 Cl. & F. 468; *Sawer v. Shute* (1792), 1 Anstr. 63.

case, to be intended by the parties to govern their rights (*t*). The intention of the parties is, no doubt, the true governing principle, if it can be ascertained, but the question is whether the law of the matrimonial domicile, or that of the place where the contract is entered into, is most likely to be in the minds of the contracting parties (*u*). *Foubert v. Turst* (1702), Prec. Ch. 207, again, was a case where the place of the matrimonial domicile, at the time of the execution of the contract, was also the place where the contract was executed, and there is nothing in the decision to support either law at the expense of the other. A different state of things existed in *Duncan v. Cannan* (1854), 18 Beav. 128, but there the marriage contract, though prepared and signed in England, was in the Scotch form, so that the intention of the parties to be governed by the Scotch law was clearly indicated. And as Lord Justice Knight Bruce, in giving judgment, attached as much weight to this fact as to the domicile of the husband, it is hardly an authority for the law of the domicile as opposed to that of the place of the contract in cases where the forms prescribed by the latter law are adopted. In *Este v. Smyth* (1854), 18 Beav. 112, the marriage contract was executed, and the marriage celebrated in France, and the validity of the former by its terms depended upon that of the latter. The parties were English by nationality, and the marriage was celebrated at the English Embassy. Lord Romilly in effect held, that whether this was a good marriage or not by the law of France, it was good in an English Court, and that the contract (to that extent) must be construed by English rules. But as to the general rights of the parties, he held that the French law must prevail, and that the contract must be expounded by it, in order that the intention of the parties might be carried into effect. Of the matrimonial domicile nothing is said in the judgment, except that the fact of the parties being *resident* in France at the time of the execution of the contract was immaterial. This case is not an authority for the law of the matrimonial domicile as opposed to that of the place of the execution of the contracts. In *Guépratte v. Young* (1851), 4 D. G. & Sm. 217, the law of France, which was the domicile of the husband and the *locus celebrationis*, was expressly adopted by the nuptial contract.

The proposition that the legality and operation of marriage contracts depend always upon the law of the matrimonial domicile cannot now be accepted in its entirety, at any rate with regard to a settlement made in England in a case where the

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Lex domicilii
—oust by
agreement.

(*t*) Priv. Int. Law (1922), § 39.

(*u*) Cf. also *Re Bankes, Reynolds v. Ellis*, [1902] 2 Ch. 33; *Sawrey-Cookson v. Sawrey-Cookson's Trustees* (1905), 8 F. (Ct. of Sess.), 157.

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domicil of the husband only is foreign. In such a case it would seem that an English Court will be indisposed to allow the subsequent operation of the settlement to be interfered with by any act of foreign law, though that law belongs to the matrimonial domicil. Thus, in *Colliss v. Hector* (1875), 19 Eq. 334, where a settlement had been made in England on a marriage between a domiciled Turkish subject and an English lady, entered into on the faith of the husband's representations that he would reside in England, a divorce in Turkey was disregarded, the effect of which by Turkish law was to annul the settlement, but which had in fact been pronounced without notice to the wife or the other persons interested under the settlement. It cannot be said, however, that Hall, V.-C., in that case expressly decided against the law of the domicil, inasmuch as he expressed himself satisfied that the husband represented to the wife at the time of the marriage that he intended to leave Turkey and come to reside as a domiciled Englishman, whether that was in reality his intention or not. It was apparently assumed that this fact was sufficient to oust the law of the husband's actual domicil altogether, and the Vice-Chancellor said that the rights of the parties claiming under the settlement must be recognised and dealt with according to English law, by which the contract, being English, was admittedly to be expounded. Regarding the contract as English, it was further said that a Turkish Court could not make void an English settlement in the absence of parties taking benefits under it. It is not quite clear whether the Vice-Chancellor intended by the expression "an English settlement" a contract made in England, and nothing more, or a contract made in England by a person who announced at the same time his intention of taking an English domicil; but it is plain enough, that inasmuch as the matrimonial domicil remained as a matter of fact Turkish throughout, the decision is an authority to show that the law of that domicil is not allowed absolutely to control a settlement made in England. Perhaps the clearest way of indicating the principle involved is that taken by Lord Romilly in *Van Grutten v. Digby* (1862), 31 Beav. 561, where it was said that if a foreigner and an Englishwoman make an express contract previous to marriage, and if on the faith of that contract the marriage afterwards takes place, and if the contract relates to the regulation of property within the jurisdiction and subject to the laws of this country, in such a case an English Court will administer the law on the subject as if the whole matter were to be regulated by English law. So in *In re Bankes; Reynolds v. Ellis*, [1902] 2 Ch. 333, where an Englishwoman married an Italian, and a marriage settlement

was executed in English form, dealing with English property, which would have been wholly inoperative by Italian law, it was held that the parties intended that their contract should be regulated by English law, and that the law of the matrimonial domicile should be excluded.

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And in *In re MacKenzie; MacKenzie v. Edward Moss*, [1911] 1 Ch. 578, where a domiciled Scotsman married a domiciled Englishwoman and contemporaneous settlements were made by the husband in Scottish and by the wife in English form, it was held that the parties intended the Scottish settlement to be governed by Scottish law and the English settlement by English law. In *Montgomery v. Zarifi* (1919), 88 L. J. P. C. 20, where a domiciled Scotsman married a domiciled Englishwoman, and the settlement was in English form with a provision "that the rights of all persons claiming thereunder should be regulated according to the law of England," and the matrimonial domicile subsequently became Scottish, it was held that the rights to the matrimonial property must be governed by English law.

In *Lister's Judicial Factor v. Syme*, [1914] S. C. 204, an ante-nuptial contract of marriage was entered into between an Englishman (Lord Lister) residing in Scotland and Miss Agnes Syme (Lady Lister) whereby a fund provided by the wife should after her death, failing issue, go to her next-of-kin, excluding her husband. Some years after the marriage the parties moved to England and Lady Lister died domiciled there. It was held that it was the intention of the parties that the wife's next-of-kin by the law of Scotland should be entitled to the fund.

In *Hewitt v. Hewitt* (1914), 31 T. L. R. 13, where a domiciled Englishman married a domiciled Scottish woman, and the settlement was in Scottish form, it was held by Eve, J., to be a Scottish settlement. It was held further that the Public Trustee Act, 1906, did not extend to a foreign settlement, and that there was nothing in the Act enabling the Public Trustee to accept trusts outside the jurisdiction, but that did not prevent him from accepting the trusts of an English settlement which included property outside the jurisdiction.

The true test in all such cases appears to be one of intention. In *Van Grutten v. Digby*, Lord Romilly, while admitting that foreigners—i.e. persons domiciled abroad—may enter into contracts in England to be governed exclusively by the law of their own country, held that the effect of the provisions in the particular marriage settlement then under his consideration was, that the subject-matter of it was to be regulated by English law. So in *Colliss v. Hector* the circumstance that the marriage had been entered into on the faith of a representation by the

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husband, that he intended forthwith to change his domicile from Turkey to England, was considered as clearly showing that the law of England was the proper one to regulate its effect, as it was the only one which was expected to do so. The earlier case of *Watts v. Shrimpton* (1856), 21 Beav. 97, is less clearly indicative of regard to the intention of the parties inasmuch as it does not appear plainly from the judgment whether the funds which were the subject-matter of the litigation were or were not comprised in the settlement, and that very question was disputed in the course of the argument. The husband's domicile at the time of the marriage was French, and the settlement was made in England, both the contracting parties being English by nationality, and under these circumstances it was held by Lord Romilly that the contract was English, and to be regulated by English law. So far as it related to property in England, there was no doubt the same reason for appealing to the English law as existed in *Van Grutten v. Digby*.

When by the law of the matrimonial domicile (which the wife acquired by marriage during infancy) a woman was regarded as without power of affirming or ratifying a pre-nuptial contract for a settlement, it was held that she was entitled to repudiate it, although by English law it would have been too late for her to do so (x). It was assumed that the wife's power of affirming or repudiating the contract depended upon the law of the matrimonial domicile, and the question seems to have been regarded as one of the *capacity* of the woman. The *lex domicilii* was unquestionably the right governing law; but it may be doubted whether there was any question of capacity, in the strict sense, involved. It must be assumed that the parties to the pre-nuptial contract intended that their powers of repudiating or ratifying it after marriage should be governed by the law which regulated all their other post-nuptial powers and obligations—i.e. the law of the matrimonial domicile. The case seems therefore to fall rather within the category of those in which the construction and incidents of contracts are referred to the law indicated by the intention of the parties (y).

Matrimonial
domicil—
effect of
change in,
on succes-
sion to
property.

It has been hitherto assumed that the matrimonial domicile at the date of the marriage remains unaltered; but the possibility of its change must also be considered. It is obvious that inasmuch as it is in the sole power of the husband to alter the matrimonial domicile for any other he may select, such an alteration ought not to affect any rights of the wife actually vested in her by pre-nuptial contract. Where a written settle-

(x) *Viditz v. O'Hagan*, [1900] 2 Ch. 87; 69 L. J. Ch. 507. See *ante*, p. 349.

(y) *Infra*, Pt. III., chap. viii. (d), (1); and see *In re Bankes, Reynolds v. Ellis*, [1902] 2 Ch. 333, 342.

ment has been entered into on the marriage, it has never been contended that the rights created by it could be affected by a subsequent change of domicile: but in *Lashley v. Hog* (1864), 4 Paton, 581; S. C. 1 Rob. Sc. App. Ca. 24, it was held by Lord Eldon that where a domiciled Englishman acquired a Scotch domicile after his marriage in England (without a settlement), the distribution of his personal estate was governed by Scotch law, and that his wife (who predeceased him) was entitled to her share. It must be noted that neither husband nor wife had by their marriage acquired any rights in the property of the other, and the only question was whether on the death of the husband, the distribution of his property was to be regulated by the law of his then domicile or not? It is difficult to see that this question could be answered in any way but one, but some expressions used by Lord Eldon in giving judgment were used in *In re De Nichols, De Nichols v. Curlier*, [1900] A. C. 21, to support the contention that the rights acquired by a French wife of "*communauté des biens*" were lost by the subsequent acquisition by the husband of an English domicile. The House of Lords, in the case cited, held that the rights of the wife, acquired by marriage when the domicile was French, were not affected by the acquisition of an English domicile afterwards, on the ground that French spouses, marrying without a written settlement, impliedly contract for a *communauté des biens* under the French code. It does not appear that the correctness of *Lashley v. Hog* is affected by this decision, since they found that that case turned on testamentary and not on matrimonial law. The argument that English spouses similarly enter into an implied contract that their property shall be regulated by English law, has no doubt some plausibility. The distinction appears to be that in the case of an English marriage, the distribution of the property on the husband's death depends upon the fact whether or not he dies intestate, which is in his own power. The wife therefore acquires no vested rights in his property by marriage, and does not contract for any. Consequently, there seems to be no reason why, at his death, the law of his domicile should not regulate the succession.

It is probably on the peculiar importance of the law of the matrimonial domicile on all questions arising out of the marriage, that those decisions are really founded, which refer the question of capacity to enter into a matrimonial contract as to property to the *lex domicilii*, in preference to the *lex loci* (z). The question of capacity to contract, however, will be found treated at some length under that heading (a).

(z) *Cooke's Trusts* (1887), 56 L. J. Ch. 637; *Cooper v. Cooper* (1888), 13 App. Cas. 88, 108.

(a) *Infra*, chap. viii.

APPENDIX TO CHAPTER VII.

THE WILLS ACT, 1861.

24 & 25 VICT. CAP. 114.

An Act to amend the Law with Respect to Wills of Personal Estate made by British Subjects.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall, as regards personal estate, be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin.

2. Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall, as regards personal estate, be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made.

3. No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same.

4. Nothing in this Act contained shall invalidate any will or other testamentary instrument as regards personal estate which would have been valid if this Act had not been passed, except as such will or other testamentary instrument may be revoked or altered by any subsequent will or testamentary instrument made valid by this Act.

5. This Act shall extend only to wills and other testamentary instruments made by persons who die after the passing of this Act.

Part III.—ACTS.

CHAPTER VIII.

CONTRACTS.

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INASMUCH as the greater part of the contracts entered into in the transaction of the ordinary business of life relate more or less directly to *property*, of one kind or another, it has been necessary in the course of the preceding pages, while speaking of the operation of local and foreign laws upon movable and immovable property, to refer more than once to the relation to the same laws of the contracts by which such property is dealt with, and to show that the operation of those contracts is often modified and governed by the effect of the *lex situs* upon the subject-matter with which they are concerned. The necessity of treating of the rights and capacities of *persons* has similarly given rise to a discussion, which would otherwise have been premature, of the effect which such strictly personal qualifications have upon the contracts into which the persons enter. It is nevertheless possible, theoretically speaking, to consider the subject of contracts by itself, abstracting them in theory from the persons who make them and the property which they concern. In practice it will no doubt frequently be found that the law of persons, and the law of property, arise either singly or together to compete with the law of contracts for the ultimate decision of the particular case which is the subject of inquiry; but this is a difficulty which is not confined to private international jurisprudence, and occurs with equal frequency in the investigation of ordinary municipal law. But the inevitable result must be, that just as, in the consideration of the claims of English law to regulate things and persons, it was not practicable to escape entirely from its operation upon contracts, so in the discussion of contracts, it will be impossible uniformly to ignore the law of persons and things.

In considering the jurisdiction assumed by English law over contracts, and the extent of its right to determine and define those which come before it, the following factors must be regarded as important: (i.) The place where the contract was made, or the *locus contractus celebrationis*; (ii.) the place where the contract is to be or was to be performed, or the *locus solutionis*; (iii.) the *situs*, or situation of the property with it is

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intended by the contracting parties to affect; (iv.) the *status* of the contracting parties themselves; and (v.) the operation of the *lex fori* upon the remedy which the litigants seek to obtain from the English Court. The questions of *situs rei* and *status personæ* have already been discussed, and the whole subject of *remedies* will be considered when treating of Procedure; but it will not be practicable to keep the consideration of contract law as a whole entirely distinct from these last-mentioned branches of the subject. It is proposed to treat here of contracts from their inception to their enforcement according to the natural order in which the difficulties arising from the subject present themselves.

(i.) JURISDICTION AS TO CONTRACTS.

It is not proposed to enter into the questions of jurisdiction which are peculiar to Roman jurisprudence and to the systems of those countries which are derived from the civil law. The distinctions between the *forum rei*, the *forum domicilii*, the *forum actoris*, the *forum rei sitæ*, the *forum rei gestæ*, and the *forum rei solvendæ* are of little practical importance to the English lawyer (a), whose object is to inquire simply how far the statutory and common law powers of his own Courts extend, and over what matters they will assume and maintain jurisdiction.

The jurisdiction which entitles the tribunals of any State to pronounce judgment *in personam*, arises from its sovereign territorial power. “*Extra territorium jus dicenti impune non paretur*” (b). The subjects of a State, bound to it by the tie of allegiance, are in a special and theoretical sense under the control of their lawful Sovereign wherever they go. This is illustrated in English law by the practice of serving a writ upon a British subject out of the jurisdiction, but notice of the writ only upon a foreigner. But for the purpose of enforcing contracts between individuals, the State does not ordinarily look to their nationality as a test of its competence. It looks rather to see if it is competent in fact to entertain the suit, and enforce its own decree. “Territorial jurisdiction,” said Lord Selborne, *Sirdar Singh v. Rajah of Faridkote*, [1894] A. C. 670, “attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists

(a) They may be found discussed in Story, §§ 532-538; Westlake, *Priv. Int. Law* (1922), pp. 5, 256, *seq.* J. Voet, *Pandect.*, tom. i. lib. 5, § 77, *seq.*

(b) Dig. II. i, 20; cf. Story, § 539.

always as to land within the territory, and it may be exercised over movables within the territory; and in questions of status or succession governed by domicile, it may exist as to persons domiciled, or who when living were domiciled within the territory . . . but no territorial legislation can give jurisdiction, which any foreign State ought to recognise, against foreigners who owe no allegiance or obedience to the Power which legislates."

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The element of the English Common Law, which as a matter of fact prevented these questions from ever arising in its administration, was the technical rule of venue, which divided all actions into two exhaustive classes, local and transitory. Local actions were those connected in any way with the soil, which it was always necessary to bring in the country where the cause of action arose, and the distinction arose in the following way. By the old Common Law the jurors were to be summoned from the particular place or neighbourhood (*vicinetum*, *visne*) where the facts happened, it being then thought highly desirable that they should be cognisant of their own knowledge (*c*), apart from the evidence, of the matters in dispute. It was therefore necessary, for the guidance of the sheriff in executing the writ of *venire facias*, that the pleadings should show what the place or neighbourhood was (*d*), and the term "laying the venue" was given to the required allegation. But in course of time the jury began to be summoned no longer as witnesses but as judges, to receive the facts from the testimony of others judicially examined before them (*e*), and the necessity of their being summoned from the *vicinetum* where the facts occurred—in other words, the necessity for that reason of the venue being truly laid—ceased. It was from this time that the distinction between local and transitory actions began; the former including all matters necessarily involving the idea of a certain place or part of the soil, the latter those which affected the person, or the movables which follow the person, and which might therefore have happened anywhere. With regard to local actions it was held that if the venue alleged in the margin of the pleadings was untruly laid—*i.e.* if on trial the action appeared to be connected with the soil of some place outside the county of the venue as laid—the variance was fatal, and the plaintiff failed. If, on the other hand, the facts of the action were transitory—*i.e.* such as might have occurred anywhere—the fact that the venue, as laid, was not the place where they were actually proved to have happened, was immaterial (*f*).

Rules of
venue.

(c) Co. Litt. by Harg. 125 a, n. (1).

(d) *Ilderton v. Ilderton* (1793), 2 H. Bl. 161; Co. Litt. 125 a, b.

(e) Stephen on Pleading, 7th ed. p. 235.

(f) *Mostyn v. Fabrigas* (1774), 1 Sm. L. C. (1903), p. 591, and cases cited in note. So for torts to realty abroad, no action lay in England; *secus*, as to personal wrongs, *Skinner v. East India Co.* (1665), cited in Cowper, 167, 168.

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The consequence was that any contract, not directly connected with the soil, could be sued on in an English court without regard to the place where it arose or was to be performed, if the defendant could be only rendered amenable to the Court's process, and service could be effected upon him according to its regulations.

Effect of
Common Law
Procedure
Acts.

The former practice of the Common Law and Chancery Courts differed in several essential points. At common law personal service within the realm was necessary until 1852. The Common Law Procedure Act of that year permitted service abroad (except in Scotland or Ireland) in actions against both British subjects (*s.* 18) and foreigners (*g*) (*s.* 19), when there was a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction; and the Court or a judge, on being satisfied by affidavit of these facts, and that reasonable efforts were made to effect service of the writ, which had come to the defendant's knowledge, were empowered to dispense with service altogether (*h*). It will be seen that the limitation confining this statutory power to cases in which there was a cause of action which arose within the jurisdiction, or in respect of a breach of a contract made within the jurisdiction, may be construed in two ways: first, as confining the statutory power in respect of actions on contract to cases where the contract was made within the jurisdiction; and secondly, as including cases where the contract was made abroad, but the breach took place in England—this second construction regarding the breach of a contract as a “cause of action” within the meaning of the first part of the limitation. Upon this question the Courts at Westminster at first held divided views; the Queen's Bench adhering to the view that it was insufficient that the breach of a contract should take place within the jurisdiction, if the contract itself was made abroad (*i*), while the Courts of Common Pleas and Exchequer acted upon the opposite construction (*k*). In consequence of these conflicting decisions a conference of the judges was ultimately held upon the subject, and the view taken by the Court of Common Pleas in *Jackson v. Spittall* was accepted as binding once for all (*l*): so that according to this, the latest authority, a plaintiff was entitled under the Common Law Procedure Act, 1852, to serve the defendant abroad, if he could show

(*g*) Foreigners resident in Scotland or Ireland might be served there, though British subjects were exempt: Day's C. L. P. Acts, p. 58, n.

(*h*) *Binet v. Picot* (1859), 28 L. J. Ex. 244.

(*i*) *Allhusen v. Malgarejo* (1868), 3 Q. B. 340; *Cherry v. Thompson* (1872), 7 Q. B. 573; and see *Sichel v. Borch* (1864), 2 H. & C. 954.

(*k*) *Jackson v. Spittall* (1870), 5 C. P. 542; *Durham v. Spence* (1870), 6 Ex. 46; *Vaughan v. Weldon* (1874), 10 C. P. 49.

(*l*) *Vaughan v. Weldon*, *supra*.

that the contract was either made or broken within the jurisdiction.

The subject, however, is now regulated by Order XI. rr. 1—8a of the Rules of the Supreme Court, which is intended by the Legislature to be exhaustive, and to supersede the former practice (*m*). By r. 1 service out of the jurisdiction may be ordered wherever (*inter alia*) “the action is one brought against a defendant not domiciled or ordinarily resident in Scotland to enforce, rescind, dissolve, annul or otherwise to affect a contract or to recover damages or other relief for or in respect of the breach of a contract—

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Service out
of jurisdic-
tion.

- (i) made within the jurisdiction, or
- (ii) made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction, or
- (iii) by its terms or by implication to be governed by English law,

or is brought against a defendant not domiciled or ordinarily resident in Scotland or Ireland in respect of a breach committed within the jurisdiction of a contract wherever made, even though such breach was preceded or accompanied by a breach out of the jurisdiction, which rendered impossible the performance of the part of the contract which ought to have been performed within the jurisdiction.”

Paragraphs (i), (ii) and (iii) are disjunctive, and it was held in *Wansborough Paper Co., Lim. v. Laughland*, [1920] W. N. 344, that if the claim fulfils any one of these conditions there is power to order service out of the jurisdiction. The defendant was domiciled and ordinarily resident in Scotland. Under this rule the breach is the only essential; and it has been held that an order was rightly made limiting the plaintiff's right of action after service was effected to the subject-matter in respect of which the writ could be properly served under this rule (*n*). The rule is therefore one dealing with jurisdiction, not with procedure. There must be a breach within the jurisdiction of a contract which by its terms ought to be performed within the jurisdiction; but it is not, of course, necessary that this should appear in express words (*o*). It must follow from the language (*p*). Thus, where an act has to be done by a person

(*m*) *Re Eager* (1883), 22 Ch. D. 86. For text of Order XI., r. 1, see Chap. X., *infra*.

(*n*) *Thomas v. Duchess of Hamilton* (1886), 17 Q. B. D. 592. Cf. *Harris v. Fleming* (1879), 13 Ch. D. 208.

(*o*) *Duval & Co., Ltd. v. Gans*, [1904] 2 K. B. 685, C. A.; *Crozier, Stephens & Co. v. Auerbach*, [1908] 2 K. B. 161, C. A.

(*p*) *Bell v. Antwerp, London, and Brazil Line*, [1891] 1 Q. B. 103, C. A.; *Hoerler v. Hanover Works* (1893), 10 T. L. R. 22, 103, C. A.

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resident within the jurisdiction, or a payment made, the contract for the act of payment is within the rule (q). If the contract is to deliver goods, and the property passes in England, non-delivery is a breach within the jurisdiction (r); but if, on the other hand, the property passes in a foreign country non-delivery is not such a breach (s). But it is not sufficient that damages should accrue within the jurisdiction (t); or that a letter amounting to a breach of contract, posted out of the jurisdiction, should be received within it (u). It is also insufficient to show that the contract may or should be performed in England. The circumstances must be such that the contract must be performed wholly, or in part, in England (x). So that, if the contract is one that, according to its terms, can wholly be performed abroad, or may be performed either in this country or abroad, leave to serve out of the jurisdiction will be refused (y). Under the old rule it was established that if the agent in England of the seller in a foreign country under a c.i.f. contract failed to deliver the shipping papers to the buyer in England, the breach of that essential part of the contract occurred in England, and leave to serve the writ out of the jurisdiction was given, even though the seller had failed to ship the goods in the foreign country (z). But in *Johnson v. Taylor Bros. & Co.*, [1920] A. C. 144, these and earlier decisions were overruled, the House of Lords holding that the failure of the seller to ship the goods was an essential breach of the contract. "The Legislature," said Lord Birkenhead, L.C., "intended to prohibit the service of writs out of the jurisdiction in actions for breach of contract unless, according to the terms of the particular contract, it ought to be performed within the jurisdiction. . . . The undertaking to ship is not a

(q) *Reynolds v. Coleman* (1887), 36 Ch. D. 453; *Roby v. Snaefell Co.* (1887), 20 Q. B. D. 152; *Daniels v. Oakley* (1886), 28 Sol. Journ. 477.

(r) *Nathan v. Seitz* (1888), 4 T. L. R. 570.

(s) *Crozier, Stephens & Co. v. Auerbach*, [1908] 2 K. B. 161, C. A.

(t) *Shearman v. Findlay* (1883), 32 W. R. 122. This has held otherwise under the Rules of 1875, which were superseded by those cited. See also *Moritz v. Stephan* (1888), 36 W. R. 779; and, for examples, see *Call v. Oppenheim* (1885), 1 T. L. R. 623; *Hassall v. Lawrence* (1888), 4 T. L. R. 23; *Watson v. Dreyfus*, *ibid.* 148; *Nathan v. Seitz*, *ibid.* 570; *Barrow v. Myers*, *ibid.* 441; *Wancke v. Wingreen* (1889), 5 T. L. R. 696.

(u) *Holland v. Bennett*, [1902] 1 K. B. 867 (a case of notice of dismissal given by a foreigner resident abroad by a letter written and posted abroad to the plaintiff in this country; *held*, no breach within the jurisdiction). Cf. *Mutzenbecher v. La Aseguradora Española*, [1906] 1 K. B. 254, C. A. With regard to action for breach of promise, see *Franklyn v. Chaplin* (1900), 17 T. L. R. 84, C. A.; *Cooper v. Knight* (1901), 17 T. L. R. 299, C. A.

(x) *Rein v. Stein*, [1892] 1 Q. B. 753; *Bell v. Antwerp, London, and Brazil Line*, [1891] 1 Q. B. 103, C. A.

(y) *Comber v. Leyland*, [1898] A. C. 524; *Bell v. Antwerp, London, and Brazil Line*, [1891] 1 Q. B. 103, C. A.; *The Eider*, [1893] P. 119, C. A.; *Johnson v. Taylor Bros. & Co.*, [1920] A. C. 144.

(z) *Biddell Bros. v. Horst & Co.*, [1911] 1 K. B. 934; [1912] A. C. 18; *Orient Co., Ltd. v. Brekke* (1913), 18 Com. Cas. 101.

contract which according to its terms ought to be performed within the jurisdiction." This decision was distinguished in *Hemelryck v. William Lyall Shipbuilding Co.*, [1921] A. C. 198, where it was held by the Judicial Committee of the Privy Council that upon the repudiation by the buyer under a contract for the sale of ships to be delivered within the jurisdiction, but to be paid for outside the jurisdiction, the refusal to accept delivery was a breach of a real and substantial cause of action. Consequently the Court had power to grant leave to serve notice of writ outside the jurisdiction. The new rule would appear to remove all doubts. Where there is *prima facie* evidence of a breach within the jurisdiction, and the breach is disputed on the other side, leave is granted, unless the *prima facie* case is entirely displaced (a).

The exception as to defendants domiciled or ordinarily resident in Scotland or Ireland is not based on any principle of international law, but is due to the energetic guardianship by Scottish and Irish members of the interests of their constituencies. There can be no reason in the nature of things why a Scotsman who has contracted to pay money in London should not be as amenable to the process of the English Courts as a Frenchman in a like position would be; but it has already been seen that under the Common Law Procedure Acts there was no power of serving Scotsmen or Irishmen in Scotland or Ireland, although foreigners in those countries could be so served; and as against Scotsmen and Irishmen, Parliament has never given this extended process to the English Court (b). It is obvious that the words of the exception in the rule would prevent service of an English writ in France upon a Scotsman temporarily or even ordinarily resident in France, provided that he retained his Scottish domicile—a consequence which was probably not contemplated, as the Scottish grievance was based upon the hardship of taking Scottish defendants away from their own courts. The effect of s. 62 of the Companies Act, 1862, which provides for service generally upon companies by post, is to make the same principle applicable to Scottish and Irish corporations (c).

By r. 8A "service out of the jurisdiction may be allowed by the Court or a judge of the following processes or of notice thereof,

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Persons
ordinarily
resident in
Scotland or
Ireland.

(a) *Badische Anilin und Soda Fabrik v. Chemische Fabrik vormals Sandoz* (1903), 88 L. T. 490, C. A.; affirmed (1904), 90 L. T. 733, H. L.

(b) *Watkins v. Scottish Imperial Co.* (1889), 23 Q. B. D. 285; *Jones v. Scottish Accident Co.* (1886), 17 Q. B. D. 421; *Lenders v. Anderson* (1883), 12 Q. B. D. 56; *Channel Coaling Co. v. Ross*, [1907] 1 K. B. 145. This subsection is imperative; and the exception as to Scotland and Ireland cannot be enlarged by agreement: *British Wagon Co. v. Gray*, [1896] 1 Q. B. 35; *Montgomery v. Liebenthal*, [1898] 1 Q. B. 487, C. A.

(c) *Watkins v. Scottish Imperial Co.* (1889), 23 Q. B. D. 285, per Mathew, J.; *Wood v. Anderston Foundry Co.*, 36 W. R. 918.

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viz. : (a) Originating summonses under Order LIV.A or Order LV. rr. 3 or 4 in any case where, if the proceedings were commenced by writ of summons they would be within r. 1 of this Order. (b) Any originating summons, petition, notice of motion or other originating proceedings (1) in relation to any infant or lunatic or person of unsound mind; or (2) under any statute under which proceedings can be commenced otherwise than by writ of summons; or (3) under any Rule of Court or Practice whereunder proceedings can be commenced otherwise than by writ of summons. (c) Without prejudice to the generality of the last foregoing sub-head any summons, order, or notice in any interpleader proceedings, or for the appointment of an Arbitrator or Umpire, or to remit, set aside, or enforce an award in an arbitration held or to be held within the jurisdiction. (d) Any summons, order or notice in any proceedings duly instituted whether by writ of summons or other such originating process as aforesaid, Rr. 2, 4, 5, 6, 7, and 8 of this Order shall apply *mutatis mutandis* to such service."

The order giving leave to serve a writ abroad is made on affidavit (Order XI. r. 4), or supported by other evidence (*d*), and r. 5 directs that the order shall limit a time after service or notice within which the defendant is to enter appearance. The application containing certain necessary particulars (Order XI. r. 4) is to be made, not to a master or district registrar, but to a judge in chambers (*e*). When the defendant is neither a British subject nor in British dominions, notice of the writ is to be served on him, and not the writ itself (r. 6) (*f*). Service of a writ on a foreigner not in British dominions is a nullity, not a mere irregularity (*h*). Foreign corporations are for this purpose in the same position as foreign natural persons, and should be served with notice of the writ only (*i*). If the defendant is a British subject residing abroad, the writ itself may be served (*k*).

(*d*) *Holland v. Leslie*, [1894] 2 Q. B. 346, 450, C. A.; *Dickson v. Law*, [1895] 2 Ch. 62.

(*e*) R. S. C. Order LIV. r. 12 (*b*). Cf. *Stigand v. Stigand* (1882), 19 Ch. D. 460.

(*f*) For the forms of the notice, see R. S. C., App. A., Part I, Nos. 9, 10; *Reynolds v. Coleman* (1887), 36 Ch. D. 453.

(*h*) *Hewetson v. Fabre* (1888), 21 Q. B. D. 6; *Field v. Bennett* (1886), 28 Sol. Journ. 477; *Westman v. Aktiebolaget, &c.* (1876), 1 Ex. D. 237.

(*i*) See cases cited in the Annual Practice, note to Order XI. r. 6. Under the C. L. P. Acts, foreign corporations could not be served abroad: *Ingate v. Austrian Lloyd's* (1858), 4 C. B. (N.S.) 704.

(*k*) *Great Australian Gold Mining Co. v. Martin* (1877), 5 Ch. D. 1, C. A. This has been ordered even when the defendant was a woman, English by nationality, who was married to a foreigner: *Padley v. Camphausen* (1878), 10 Ch. D. 551, but *semble*, without the attention of the Court being drawn to the Naturalization Act, 1870 (33 Vict. c. 14), s. 10 (1). See, as to personal jurisdiction under this order in respect of movable property, *ante*, pp. 280 *seq.*

It should be noted that when leave is asked under Order XI. r. 1, to serve a writ in Scotland or Ireland, if it shall appear to the Court or judge that there may be a concurrent remedy in Scotland or Ireland (as the case may be), the Court or judge is given a discretion in granting or refusing the order having regard to the comparative cost and convenience of proceeding in the two countries; particularly in cases coming under the Sheriff's Courts or Small Debts Courts in Scotland, or the Civil Bill Courts in Ireland, Order XI. r. 2). As Lord Esher said in *Williams v. Cartwright*, [1895] 1 Q. B. 142, this rule "is for the further protection of persons resident in Scotland or Ireland, not in favour of the person desiring to serve a writ there."

In addition to the power of ordinary service abroad in any action founded on a breach in England of any contract which ought to be there performed (Order XI. r. 1 (e)), the same power is given by another sub-section of the rule, (c), in all cases "where any relief is sought against any person domiciled or ordinarily resident within the jurisdiction." This would obviously permit service abroad in many cases of contracts to be performed abroad; and, inasmuch as service would be idle if the action was not to be entertained, it would seem to imply a jurisdiction based on "ordinary residence" within the jurisdiction. If the words "domiciled" and "ordinarily resident" are not merely tautologous (which can hardly be supposed) they must mean different things; and the anomalous exception affecting Scotsmen and Irishmen in sub-s. (e) of the rule may lead to an embarrassing conflict. The case may readily happen of a man who is "ordinarily resident" in England, but who retains a Scottish domicile, and is temporarily present in Scotland. Can leave be obtained to serve on him a writ in an action based on contract to be performed in England? According to Order XI. r. 1 (c), it can, because relief is sought against a person "ordinarily resident" within the jurisdiction. According to Order XI. r. 1 (e), it cannot, because he is domiciled in Scotland. The true answer would appear to be in the affirmative, on the ground that the exception as to Scotsmen only cuts down sub-s. (e); and that if the case can be brought within (c), which is a distinct sub-section, the exception does not apply to it.

It has been held that a company, having its head office in Scotland, with branch offices in England and a chief office for England in London, is not "domiciled or ordinarily resident" in England within this rule (l).

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Scotland and
Ireland—
Order XI.
r. 2.

Service
abroad on
persons
domiciled
or resident—
Order XI.
r. 1 (c), (e).

(l) *Jones v. Scottish Accident Insurance Co.* (1886), 17 Q. B. D. 421; 55 L. J. Q. B. 415. As to the meaning of "ordinarily resident," see *Ghikis v. Musurus* (1909), 25 T. L. R. 225; *Allison v. Independent Press Cable Association of Australasia, Ltd.* (1911), 28 T. L. R. 128, C. A.; *Actiesselskabet*

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Service
abroad on
necessary
and proper
parties to
action
against per-
son within
jurisdiction—
Order XI. r. 1
(g).

Foreign
judgments.

Essentials to
enforcement
of foreign
judgments.

Lastly, service abroad is allowed under Order XI. r. 1 (g), in cases where “any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.” Under this rule it has been held that service abroad may be ordered against a person who is substantially a defendant (*m*). Thus, in an action against defendants in London for breach of warranty of authority, the foreign principals, who had repudiated the contract on the ground that it was unauthorised, were held to be “necessary or proper parties” (*n*). So, in an action on a promissory note against an indorser in England, the maker in New York was held to be properly served within this rule (*o*). To obtain leave under this rule, it must be shown on affidavit at the time of the application that there is a defendant who has been duly served within the jurisdiction (*p*).

The question of jurisdiction has been so far considered only with reference to the English rules as to service out of the territorial jurisdiction. The actual presence of a defendant within the territorial jurisdiction has hitherto been considered sufficient to entitle the English Courts to entertain any suit against him which was not concerned with foreign immovables, or otherwise required a local venue abroad (*q*). Even in the case of an action on a contract affecting foreign land, it has already been shown that a decree has been frequently made *in personam*, certainly where the defendant is justiciable to the English Court by domicile, possibly even when the contract was made in England only (*r*). With respect to contracts not affecting foreign immovables, the English theory of jurisdiction is perhaps best seen from the view taken by the Courts of the validity of foreign judgments. According to Fry, J. (*s*), a defendant in a foreign action is considered bound by the judgment if one at least of the following conditions be satisfied :—(1) that he is a subject of the foreign State where it

Dampskib “Hercules” v. Grand Trunk Pacific Ry. Co., [1912] 1 K. B. 222, C. A.

(*m*) *Yorkshire Tannery Co. v. Eglinton Chemical Co.* (1884), 54 L. J. Ch. 81; *Speller v. Bristol Steam Navig. Co.* (1884), 13 Q. B. D. 96.

(*n*) *Massey v. Heynes* (1888), 21 Q. B. D. 330.

(*o*) *Sykes v. Scholfield* (1884), 28 Sol. Journ. 477. For other examples see *SS. Thanemore v. Thompson* (1885), 52 L. T. 552; *British Marine, &c. Co. v. McInnes* (1886), 31 Sol. Journ. 95; *Re Lane* (1886), 55 L. T. 149.

(*p*) *Yorkshire Tannery Co. v. Eglinton Chemical Co.* (1884), 54 L. J. Ch. 81. See, for another instance, *Jenney v. Mackintosh* (1886), 33 Ch. D. 595; also *The Duc d’Aumale*, [1903] P. 18, C. A. See *John Russell & Co., Ltd. v. Cayser, Irvine & Co., Ltd.*, [1916] 2 A. C. 298.

(*q*) See note to *Mostyn v. Fabrigas* (1774), 1 Sm. L. C. (1903), p. 591; and cf. language of Malins, V.-C., in *Matthæi v. Galitzin* (1874), 18 Eq. 340; *Davis v. Park*, 8 Ch. 862, n.

(*r*) *Penn v. Baltimore* (1750), 1 Ves. Sen. 44; 2 Tud. L. C. (1910), p. 814 seq. (notes); ante, chap. vi.

(*s*) *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, 371. Cf. *infra*, chap. xi.

was obtained (t); (2) that he was resident there when the action began (u); (3) that he selected the *forum* (x); (4) that he voluntarily appeared (y); (5) that he has contracted to submit himself to the *forum* (z). The use of the word "resident" is always more or less ambiguous (a); but whether or not it is intended as something less than "domiciled," it is clear, at any rate, that a foreign Court will be considered as entitled to entertain any action or contract against those persons who are domiciled and present within its limits. It is difficult to see any sufficient reason for attributing jurisdiction with respect to contracts to the domicile of the defendant; and it seems probable, therefore, that something less than domicile is intended by the word "resident," especially as the same ambiguity occurs in the English rule as to service out of the jurisdiction in cases "*where any relief is sought against any person domiciled or ordinarily resident within the jurisdiction*" (b). The whole subject is one of difficulty, and may perhaps be best summarised by saying that, while there are cases in which mere *presence* within the territorial limit is spoken of as sufficient to give the English Court jurisdiction (c), the stronger word "*residence*" is usually employed when the jurisdiction of a foreign Court is under discussion.

The fact that a foreigner is a claimant in an interpleader issue has been held insufficient to justify the Court in making him a defendant to a counter-claim arising out of contract, although ordinary terms might be imposed upon him on granting the interpleader issue (d).

Though service in England according to the ordinary practice is required in every case in which an order for service out of the jurisdiction cannot be obtained under Order XI. r. 1, yet the parties may contract that service in a different mode shall bind them. By r. 2A the parties to any contract may agree (a) that the High Court shall have jurisdiction to entertain any action in respect of such contract and/or (b) that service of any writ

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(t) Cf. also *Emanuel v. Symon*, [1908] 1 K. B. 302, C. A.; per Buckley, L.J., at p. 309.

(u) *Emanuel v. Symon*, *supra*; *Jaffer v. Williams* (1903), 25 T. L. R. 12.

(x) *Emanuel v. Symon*, *supra*.

(y) *Emanuel v. Symon*, *supra*; *The Challenge*, [1904] P. 41.

(z) *Emanuel v. Symon*, *supra*; *Feyericks v. Hubbard* (1902), 71 L. J. K. B. 509.

(a) It is obvious, for instance, that in this case it may mean at least three things—(a) *domiciled and actually present within the jurisdiction*; (b) *domiciled, but not present*; (c) *present within the jurisdiction, but not domiciled there*. Whether (c) includes mere casual presence is again open to argument.

(b) Order xi. r. 1 (c); *ante*, p. 365. Cf. *Huntley v. Gaskell*, [1906] A. C. 56; *Drexel v. Drexel*, [1916] 1 Ch. 251; *Casdagli v. Casdagli*, [1919] A. C. 145; *Waddington v. Waddington* (1920), 36 T. L. R. 359; *Lord Advocate v. Jaffrey*, [1921] A. C. 146; *Bell v. Bell*, [1922] 2 I. R. 152.

(c) *Mostyn v. Fabrigas* (1774), 1 Sm. L. C. (1903), p. 591 (notes).

(d) *Eschger v. Morrison* (1889), 6 T. L. R. 145.

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of summons in any such action may be effected at any place within or out of the jurisdiction on any party or on any person on behalf of any party or in any manner specified or indicated in such contract. This rule, based upon the following cases, was issued in July, 1920. Thus, where in a contract with a French company it was stipulated that the agreement should be construed by English law, and the French parties submitted to the jurisdiction of the Court, and appointed persons in England to be served with process on their behalf, it was held that such service was good, the parties having thus contracted themselves out of the ordinary British rules (e). And it is, of course, competent to the parties contracting, to contract that the Courts of the *loci celebrationis*—the place where the contract was made—shall retain jurisdiction over them and it. It was at one time suggested that such a submission might be implied in ordinary cases, but the judgment of Lord Selborne in *Sirdar Singh v. Rajah of Faridkote*, [1894] A. C. 670, shows that this is not the case, and that the agreement must be express. Where both parties to a contract agreed to submit all disputes arising out of a contract to the jurisdiction of a foreign Court, it was held that this was a submission to arbitration within the Arbitration Act, 1889; though *secus*, if the agreement had been merely that neither party would object to the jurisdiction of the foreign Court if sued in it by the other (f).

Abolition of
rules of
venue.

The restriction arising from the necessity of a local venue, in actions concerning foreign realty, has now been abolished by R. S. C., Order xxxvi. r. 1, which now authorises the Judge to change the venue, confirming the former practice. Although an appeal lies from his decision, it would not be overruled, unless an absolutely clear case is made out against it (g).

Whitaker v. Forbes (1875), 1 C. P. D. 51, commenced before the Judicature Acts came into operation, was an action for a rentcharge issuing out of land in Australia, as to which the authorities cited to show that the venue was local were conclusive (h), and the decision proceeded therefore strictly upon the technical ground that an action in which the venue was local could not be maintained here unless that venue could be laid

(e) *Tharsis Sulphur and Copper Co. v. Société des Métaux* (1889), 58 L. J. Q. B. 435. Cf. *Mason v. Comptoir d'Escompte* (1889), 23 Q. B. D. 519, and *Russell v. Cambefort* (1889), 23 Q. B. D. 526, C. A.

(f) *Austrian Lloyd Steamship Co. v. Gresham Life Assurance Society*, [1903] 1 K. B. 249; and cf. *Law v. Garrett*, [1898] 8 Ch. D. 26.

(g) *Thorogood v. Newman* (1906), 23 T. L. R. 97 (C. A.).

(h) *Thomas v. Sylvester* (1873), L. R. 8 Q. B. 368. But as to torts to foreign land, it is now settled that the English Courts decline jurisdiction on the general principles of international law, and that the abolition of the rules of venue do not affect the question. See *infra*, Part III. chap. ix., and *British South Africa Co. v. Companhia de Moçambique*, [1893] A. C. 602.

within the jurisdiction. The observations of Lord Cairns were afterwards referred to in a case commenced under the Judicature Acts, and to which the new rules abolishing venue therefore applied. The claim stated that the plaintiffs and defendants were each of them limited companies with registered offices in London, and that the action was brought for rent of a railway station in Buenos Ayres (into possession of which the defendants were put by the plaintiffs), and for part of the cost of constructing lines of railway and approaches to the station (*i*). The distinction as to venue no longer existing, it was not directly decided that the case in question was local, and that the Judicature Acts had therefore actually enlarged the jurisdiction; but it appeared to be assumed that it would be insufficient to oust the jurisdiction of the Courts to show merely that the rules of venue would formerly have prevented the action from being brought. The litigant companies both being English corporations by statute, with registered offices in London, no difficulty had arisen with respect to the service of the writ; and the only question argued was, whether the fact that the railway and premises were situate in Buenos Ayres, and that the Argentine Republic had assumed jurisdiction over the plaintiffs' claim, was sufficient to prevent an English Court, according to the comity of nations, from taking cognisance of it. It was held insufficient, on the ground that no *exclusive* jurisdiction belonged to, or had been assumed by, the Courts of the Argentine Republic, and that the law of nations did not restrain a tribunal here from dealing with a contract properly brought before it, by reason of its relating to immovable property situate in a foreign country. There are, in fact, two stages of any action at which the defence that the contract to which it relates is a foreign one may be raised. It may be raised either by opposing the application for leave to serve the writ abroad, when the defendant is not in England, or on the pleadings by demurrer (*k*). It may also, of course, be left for argument upon motion for judgment, or otherwise after verdict, but the question so raised will be exactly the same as that involved in the demurrer. First, as to the service of the writ, it has been already shown that the discretionary power of the Courts is limited and conferred by Order XI. r. 1, of the Rules of the Supreme Court; and it is submitted that, by the discretion exercised under that Order by a judge at chambers, he should refuse leave to serve abroad even in cases where the facts are strictly within the terms of the Order, if it is clear that the jurisdiction of an English Court does not properly extend to the subject-matter. In other words, it

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(*i*) *Buenos Ayres and Ensenada Port Ry. Co. v. Northern Ry. Co. of Buenos Ayres* (1877), 2 Q. B. D. 210.

(*k*) See, however, *Preston v. Lamont* (1876), 1 Ex. D. 361.

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should be governed by the same rules as those recognised and followed by the Court of Chancery before the Judicature Acts came into operation. Secondly, with regard to the cases in which the defence may subsequently be raised upon the pleadings, that course was adopted as the most suitable one in *Buenos Ayres and Ensenada Port Ry. Co. v. Northern Ry. Co. of Buenos Ayres* (1877), 2 Q. B. D. 210, but in *Preston v. Lamont* (1876), 1 Ex. D. 361, a defence substantially objecting to the jurisdiction was struck out on the ground that the question was one for chambers. It should be noticed, however, that in the case last cited part of the statement of defence which was disallowed was virtually a denial that the facts of the case came within the terms of Order XI. r. 1 at all, so that the judges' order for service beyond the jurisdiction was alleged to have been wrongly made; and there can be little doubt that many cases may arise in which, though Order XI. r. 1 is strictly applicable, the general principles of law and the comity of nations would direct an English tribunal to decline jurisdiction. Such, for example, are obviously those actions in which it is attempted to try the title to, or the right to the possession of, foreign realty, with regard to which it has been shown above (*supra*, p. 226) that the Court of Chancery never assumed jurisdiction to act directly upon foreign land, but only indirectly through the consciences of its own justiciaries. The rules of Chancery on this point being based on the principles of the law of nations (*l*), and having nothing to do with the common law technicality as to venue, remain unaltered by the Judicature Act, being only modified, at the stage of the service of the writ of summons, by the additional limitations imposed and defined in Order XI. r. 1.

Jurisdiction
—principle
of.

The question of jurisdiction in respect of contracts has been treated in the preceding pages from the point of view of the English practitioner, and tested mainly (if not solely) by the rules of practice which regulate the service of writs. Rightly or wrongly, the English law has always considered that if a writ of summons could once effectively be served, at any rate within its territorial boundaries, the defendant was at once brought within its own jurisdiction. If a defendant, once served, leaves the country next day, judgment can be and often is pronounced against him in his absence. If he appears in the action, and objects to the jurisdiction, there is no case of a purely personal action against him for a money claim in which the objection has prevailed, without reference to his nationality, or his domicile, or the place where the cause of action arose. If this principle be carried to its logical extent, it would seem to follow that service

(l) See Story, § 544, and *supra*, p. 237.

of process due to mere casual presence in an English hotel, or even an English railway train, for a single day, would be sufficient to support a suit in the English Courts against an absent defendant for any cause of action, either in contract or in tort, not affecting foreign land. It may be worth while to examine how far the theory, which would lead to these consequences, has been established.

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It is said by Coke, in his commentary on *Calvin's Case* (1608), 7 Rep. 1, that there are four kinds of "ligeances" (or allegiances). The third is *ligeantia localis*, wrought by the law; and that is when an alien that is in amity cometh into England, because as long as he is within England, he is within the King's protection; therefore as long as he is here, he oweth unto the King a local obedience, "for that the one (protection) draweth the other (obedience)." This doctrine appears co-extensive with that of Story (*m*), who says that although some jurists deny the right of a nation to legislate generally over foreigners resident within it, it would seem clear, upon principles of international law, that such a right does exist; and the extent to which it should be exercised is a matter purely of municipal arrangement and policy. The same learned writer goes on to cite Huber (*n*) for the proposition that all persons who are found within the limits of a government, "whether their residence is permanent or temporary," are to be deemed subjects thereof; and refers to Boullenois and Vattel for the further development of this principle, that the Sovereign may of strict right make laws for all persons who "merely pass through his domain," although commonly this authority is exercised only as to matters of police. It would certainly seem to follow from this language, that the mere transitory presence of a defendant within the territory would render him amenable to the Sovereign's writ, and answerable to the Sovereign's Courts. Until the Common Law Procedure Act, 1852, the English Courts proceeded, not merely upon service within their territorial limits, but upon such service only, as the foundation of their jurisdiction. In that year powers were given to serve British subjects abroad with a writ, and foreigners with notice of a writ, in cases where proof was given either (1) of a cause of action which arose within the jurisdiction, or (2) in respect of a breach of a contract made within the jurisdiction—powers which have since been amplified and defined by Order XI. r. 1 (*supra*, p. 361). But where service has been effected within the territorial limit, there never has been any enactment, or any decision, which required as a condition of jurisdiction any of those conditions which were imposed by the Legislature in

Local
allegiance.

(*m*) Story, Conflict of Laws, § 541.

(*n*) Huber, vol. 2, lib. I. iii. 2.

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the case of service, even on a British subject, when effected abroad.

The theory which regards mere service within the realm as sufficient to confer jurisdiction, without regard to the nationality or domicile or residence of the defendant, or to the locality of the cause of action, has however never received any express judicial recognition. The question does appear to have come before Lord Russell, C.J., in *Carrick v. Hancock* (1895), 12 T. L. R. 59, who is reported to have said, that the jurisdiction of a Court was based upon the principle of territorial dominion, and that the question of the time the person was actually in the territory was wholly immaterial. This is a strong expression of opinion; but it must be remembered that the judgment was an oral one, not written or considered, and also that it was unquestionably right on other grounds, independently of this difficult question. The action was an action on a Swedish judgment, obtained against the defendant after service on him of a Swedish writ during a temporary visit to Sweden, he being an Englishman not domiciled or resident in Sweden. He had, however, appeared in the Swedish action, and contested it in all its stages right up to the Swedish Court of Appeal—which was amply sufficient in itself to have rendered the judgment conclusive upon him (o); and that this Swedish judgment was conclusive is all that Lord Russell really decided.

On the other hand, there are strong expressions of judicial opinion against the propriety of bringing before an English Court disputes with which it has no concern, and often with no effective power of dealing. In *Matthæi v. Galitzin* (1874), 18 Eq. 340, the defendants were a Russian lady resident out of the jurisdiction, and a company registered in England. It did not appear how service was effected, but both the defendants appeared and demurred to the claim, on the ground that the subject-matter of the action was wholly foreign; Malins, V.-C., allowed the demurrer. “Can anyone” (he said) “sue in the Courts of this country in matters relating to foreign property, the contract being foreign and both parties foreign subjects? Certainly, according to my view, it is no part of the business of this Court to settle disputes between foreigners. There must be some cause for giving jurisdiction to the tribunals of this country; either the property or the parties must be here, or there must be something to bring the matter within the cognisance of this Court. . . . It is certainly a jurisdiction which ought not to be exercised except in cases of absolute necessity.” The Vice-Chancellor having already decided that on the facts there was no right of

(o) *Voinet v. Barrett* (1886), 55 L. J. Q. B. 39. *De Cosse Brissac v. Rathbone* (1861), 6 H. & N. 301. *Godard v. Gray* (1870), L. R. 6 Q. B. 139, 150.

action against the company unless there was one against the female defendant, the action was dismissed on the above grounds (p). So in *Norris v. Chambers* (1874), 3 De G. F. & J. 583 it was said by Lord Campbell, with reference to a foreign defendant, that an English Court ought not to pronounce a decree, even *in personam*, which can have no specific operation without a decree of a foreign Court (q); and it is clear that a judgment against a foreign defendant, who had no property in England, would be a *brutum fulmen* only.

It appears almost manifest, that in practice some modification will be required of any general rule basing jurisdiction on mere service within the realm. There is an element of absurdity in supposing that a Frenchman who visited Folkestone for a day trip, could be served there with a writ in an English Court to answer for a breach in France of a contract made in France with another Frenchman; or that one of his fellow-passengers and fellow-countrymen could bring an English action against him in Folkestone for an assault committed a week before in Boulogne. If it were sought to serve a defendant in such a case abroad, it would have to be shown that he was "domiciled or ordinarily resident within the jurisdiction" (Order XI. r. 1 (c)); and it is difficult to see that his presence in England for a few hours should be sufficient to dispense with this condition. It is probable that in an extreme case the English Courts would decline to entertain the action, in accordance with the views expressed by Malins, V.-C., in *Matthæi v. Galitzin*, as cited above; but the real difficulty would arise when the case was not extreme. It might well happen that a foreigner only casually present in England might be possessed of property here which would make it worth while to commence an action against him, even at the suit of another foreigner, and on a cause of action wholly foreign. The action would doubtless be maintainable if the defendant was "domiciled or ordinarily resident" in England. If he were "temporarily resident" or even casually present (as in the extreme cases suggested above) it is not so easy to lay down any rule. The most logical mode of dealing with the question would be to adopt the conditions of Order XI. r. 1, either in all cases, or in all cases where the plaintiff as well as the defendant was of foreign nationality, domicile, and residence; but it is doubtful whether any English Court would consider itself justified in taking so decided a course. The subject is of considerable theoretical importance, because the claim of English law to found jurisdic-

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(p) So long ago as 1687, traces of the same doctrine are to be seen in the case of *Jennings v. Hankey* (1687) (2 Jac. II.), Carthew's Reports, p. 11.

(q) Cf. *Cookney v. Anderson* (1862), 31 Beav. 452, and *Blake v. Blake* (1870), 18 W. R. 944.

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of simple
contracts.

tion on mere service within the territory, without regard to the nature of the action, has hitherto prevented any scheme for the international enforcement of foreign judgments from meeting with the acceptance of Continental jurists (r).

In *New York Life Insurance Co., Ltd. v. Public Trustee*, 39 T. L. R. 720, the plaintiff company was incorporated in New York and carried on business there and had branch offices in London and elsewhere. At the date of the Treaty of Peace Order, 1919, certain sums were due from them to German nationals under policies issued by the plaintiffs before the war. It was held by Romer, J., that though the Treaty of Peace did not exclude life insurance policies from the charge, yet as the moneys owing by the plaintiffs to German nationals were simple contract debts, which in law were situated in the country where the debtor was for the time being residing, those debts were not, at the date in question, within His Majesty's Dominions, and accordingly were not subject to the charge.

It was, said Romer, J., decided by Lord Abinger, C.B., in *Att.-Gen. v. Bouwens*, 4 M. & W. 171, that with respect to *choses in action* and titles to property, it was established law that judgment debts were assets for the purpose of jurisdiction where the judgment was recorded; leases where the land lies; specialty debts where the instrument happens to be; and simple contract debts where the debtor resides. This was followed in *Commissioners of Stamps v. Hope*, [1891] A. C. 476. In *Toronto General Trusts Corporation v. The King*, [1919] A. C. 679, the locality of a mortgage debt had to be established in order to determine whether it was liable to succession duty. The locality of a specialty debt, said Lord Cave, is the place where the specialty is found at the creditor's death. If, however, the original deed is preserved in the land registry, the debt is situate there, irrespective of the place in which the duplicate is situate.

Dicey states the general maxim as follows: "that whilst land, and generally, though not invariably, goods, must be held situate at the place where they, at a given moment actually lie, debts, *choses in action* and claims of any kind must be held situate where the debtor or other person against whom a claim exists resides; or, in other words, debts or *choses in action* are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced."

A certificate of shares in a foreign company on which a form of transfer and a power of attorney have been indorsed and

(r) This subject received considerable attention at the Glasgow Conference of the International Law Association, 1901. See the chapter on Foreign Judgments, *infra*.

executed and which are marketable in England, is property situate there: *Stern v. Reg.*, [1893] 1 Q. B. 211; *In re Clark, McKecknie v. Clark*, [1904] 1 Ch. 294; *Re Agnese*, [1900] P. 60. See *Winans v. Att.-Gen.* (No. 2), [1910] A. C. 27.

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Romer, J., therefore held that the domicile or residence of the plaintiffs at the date in question was New York, and, that being so, the simple contract debts of the plaintiffs due to the German nationals were not at that date within His Majesty's Dominions, and accordingly not subject to the charge created by the Peace Treaty Order. In *Att.-Gen. v. New York Breweries Co.*, [1899] A. C. 62, shares in a company were held to be situate in the country of the principal office of the company.

In *Cunningham's Trustees v. Cunningham*, [1924] S. C. 581, where War Stock and National War Bonds were disposed of by a domiciled Scotsman, it was held that they were Imperial or British interests, although administered in England, and, accordingly, the testator being domiciled in Scotland, the effect of the destinations which they contained fell to be ascertained according to Scots law, and not according to English law (s).

(ii.) LAW BY WHICH THE CONTRACT IS GOVERNED.

The *lex loci contractus* has always been an ambiguous term, which jurists have interpreted either as the *lex loci celebrationis* or *solutionis*, the law of the place where the contract was entered into, or of that where it was to be performed, according to the tendency of their peculiar views. A little consideration will show that, assuming that the parties entering into the contract are full of capacity to do so by every law, and that no law is transgressed or intended to be transgressed by the subject-matter of their agreement, their will is, or should be, absolutely unfettered. They should, in theory, be able to contract themselves out of or into any law they please, and the only question for a tribunal called upon to enforce the contract should be, By what law did the parties intend that their rights should be defined and governed? (t). Such law is sometimes spoken of as the "proper law of the contract" (u). According to this reasoning, the intention of the parties should be deferred to when interpreting

(s) See also *Drysdale's Trustees v. Drysdale*, [1922] S. C. 741.

(t) See e.g., *Hamlyn v. Talisker Distillery*, [1894] A. C. 202; *Spurrier v. La Cloche*, [1902] A. C. 446; *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. 589, 596; and cases cited *infra*, pp. 417 *seq.*

(u) Cf. Dicey, *Conf. of Laws* (1922), p. 572; see also *British South Africa Co. v. De Beers Consolidated Mines, Ltd.*, [1910] 1 Ch. 354, C. A.—reversed on a question of construction, [1912] A. C. 52; *Limerick Corporation v. Crompton & Co., Ltd.*, [1910] 2 I. R. 416, C. A.; *Re Bonacina, Le Brasseur v. Bonacina* (1912), 28 T. L. R. 508, C. A.; *Pena Copper Mines, Ltd. v. Rio Tinto Co., Ltd.* (1911), 105 L. T. 846, C. A.; *Howden & Co., Ltd. v. Powell Duffryn Steam Coal Co., Ltd.*, [1911] 49 Sc. L. R. 605.

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and enforcing a contract in all respects except two—the question of their capacity to contract, and the question of the legality of that for which they have contracted. An examination of the cases in detail will show how far these theoretical principles have been adopted.

(a) *Capacity to contract*.—With regard to the capacity to contract, which is generally regarded as the natural consequence of adult age, it has been said above (see pp. 100-5) that the English authorities are still discordant (x). The only express decision in respect of a mercantile or ordinary contract has been that of Lord Eldon in *Male v. Roberts* (1800), 3 Esp. 163, in favour of the *lex loci celebrationis*, though Lord Stowell seems to have inclined in the same direction in *Ruding v. Smith* (1821), 2 Hagg. Cons. 389, and Sir Cresswell Cresswell in *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67 used general language to the like effect (y). On such a matter the question of intention can obviously have no weight, and the limit of age, which the English law has imposed for the benefit and protection of its own subjects, ought surely to be conclusive within the limits of its jurisdiction. It would clearly be inequitable, for example, that a domiciled subject of Prussia or of some other Continental State which regards legal majority as postponed until the age of twenty-five, should attempt to evade the performance of a contract entered into in England when he was twenty-four, by the plea of infancy. The reverse case of an Englishman at the age of twenty-four making a contract in Prussia, and afterwards repudiating it on the same plea, has not occurred; but the other party to the contract, who would almost inevitably be Prussian by nationality or domicile, would necessarily be taken to know his own laws; and, though he might complain that he had been defrauded, could not deny that the fraud ought to have been foreseen. It is, of course, possible to imagine the case of two Englishmen transiently present in a country whose law regarded them as infants, although both had passed the English limit of twenty-one years, and there entering into a contract in ignorance or in contempt of the provisions of the *lex loci*. No English Court has been called upon to decide upon the validity of a plea of infancy offered under such circumstances, but it is difficult to think that it would be allowed to prevail.

The Court of Session, however, has decided in favour of the

(x) Cf. the words of Lord Macnaghten in *Cooper v. Cooper* (1888), 13 A. C. 88, at p. 108: "Perhaps in this country the question is not finally settled, although the preponderance of opinion, here as well as abroad, seems to be in favour of the law of the domicile, it may be that all cases are not to be governed by one and the same rule."

(y) Cf. *Ogden v. Ogden*, [1908] P. 46, C. A., at p. 59.

lex loci contractus. In *McFetridge v. Stewarts and Lloyd*, [1913] S. C. 773, a minor whose domicile was Irish and whose father resided in Ireland took service as a labourer with a firm in Scotland. Having been injured in the course of his employment, he accepted compensation without consulting his father. The agreed compensation at a reduced rate having been paid, he subsequently brought an action for damages at common law, on the ground that the agreement was invalid as he was a minor by Irish law. It was held that the agreement must be determined not by the *lex domicilii* (Irish law) but by the *lex loci contractus* (Scots law).

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Notwithstanding these considerations and authorities, a dictum of the Court of Appeal in the case of *Sottomayor v. De Barros* (1877), 3 P. D. 1, unsettled the whole subject (z), if, indeed, it did not go further, and establish the right of the *lex domicilii* to decide all questions of capacity for every purpose. *Sottomayor v. De Barros* was a case which turned upon the so-called capacity of two domiciled Portuguese, who, being first cousins, were forbidden to marry by Portuguese law, to contract marriage in England; and the Court of Appeal held the law of Portugal must prevail. It had been decided by Sir R. Phillimore in the Court below, following the stricter precedents of English law, that the law of England, the place where the contract of marriage was entered into, had been satisfied, and that the marriage was consequently valid. The case, however, was one in which considerations of natural humanity and pity called for a dissolution of the union, and the Court of Appeal, consisting of James, Baggallay, and Cotton, L.JJ., reversed his decision. There appears to have been no argument on the question of capacity generally, nor is it considered in the judgment with reference to anything but marriage, but the judgment does state it to be "a well-recognised principle of law" that the question of personal capacity to enter into any contract is to be decided by the law of the domicile. How far this dictum (a) can be regarded as applicable to that incapacity which arises from minority it may be difficult to determine; but if, with regard to that incapacity it is "a well-recognised principle of

Capacity—
lex domicilii.

(z) The language of Lord Halsbury in *Cooper v. Cooper* (1888), 13 A. C. 88, is to the same effect; but in that case there was no conflict between *lex loci*, and the *lex domicilii*, the contract having been entered into in the country of the domicile. See comments on this case, *ante*, chap. iii.

(a) Cf. *Ogden v. Ogden*, [1908] P. 46, C. A.: "It may be questioned whether that sentence [*i.e.*, the dictum that personal capacity to enter into a contract depends on the law of the domicile] is correct, and whether the question of capacity is really raised at all in such a case; that is to say, where both parties are capable of entering into a marriage, but may not marry each other because such a marriage would be illegal in their own country. That is rather a question of illegality than of capacity."

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Contract of
marriage—
characteris-
tics of.

law" that the law of domicile is to exclude the law of the place of contract, it has become so since Story wrote (b) and since Lord Eldon's decision in *Male v. Roberts* (c).

It is in truth an error to regard the so-called contract of marriage as something to be governed by the ordinary rules which the law of contract embodies; and the capacity to enter into the marriage contract may be regarded quite logically as entirely distinct from that capacity to contract, in the ordinary sense of the word to which the *dictum* of Lord Eldon in *Male v. Roberts* referred. The question of the capacity of a man and woman to marry, and of the consequent validity of their marriage, is one which essentially concerns the law of their domicile (d), because it is in the country of the matrimonial domicile that they intend to spend their married life. This is a necessary conclusion, because, if they intend to spend their married life in any other place, and have married in any place in which they are not domiciled, they have, in fact, quitted their domicile without an *animus revertendi*, and lost it or changed it for another. And if the acquisition of a new domicile has not been so complete as to divest them of the old, then, in the eye of the law they *do* intend to return to the man's original domicile or home. It being, therefore, clear that the country of the matrimonial domicile must be taken as the place where the man and woman intend to spend their married life, it follows that the law of that country, and of no other, is the law to which the validity, legality, or morality of their marriage is a matter of concern (e). It is true that this argument, if stretched, would almost go to the length of excluding the law of the place of celebration with respect to the forms and solemnities of the ceremony; but it will be shown hereafter (f) that these matters are universally referred to the *lex loci celebrationis*, for the purpose, if for no other, of securing that the formalities necessary

(b) Story, § 103; Westlake, *Priv. Int. Law* (1922), pp. 40—1 *seq.*; *Simonin v. Mallac*; *Ruding v. Smith* (1821), 2 Hagg. Cons. 389.

(c) It may be desirable to quote the language of Hannen, J., with reference to this *dictum*, as some justification of the attempt in the text to criticise the judgment of the Court of Appeal in *Sottomayor v. De Barros*: "It is of course competent to the Court of Appeal to lay down a principle which, if it formed the basis of a judgment of that Court, must, unless it should be disclaimed by the House of Lords, be binding in all future cases. But I trust that I may be permitted without disrespect to say that the doctrine thus laid down has not hitherto been 'well recognised.' On the contrary, it appears to me to be a novel principle, for which, up to the present time, there has been no English authority. What authority there is seems to me to be the other way": *Sottomayor v. De Barros* (2) (1879), 5 P. D. 100.

(d) *Sottomayor v. De Barros* (1877), 3 P. D. 1, C. A.; *Brook v. Brook* (1861), 9 H. L. Cas. 193; *Ogden v. Ogden*, [1908] P. 46, C. A.

(e) "Locus matrimonii contracti non tam is est, ubi contractus nuptialis initus est, quam in quo contrahentes matrimonium exercere voluerunt."—*Huber*, *Confli. Leg.* i. tit. 3, s. 10.

(f) *Infra*, p. 388.

to bind the parties shall be duly performed in the sight of the only law which has at the moment of celebration the right to control them. Further, all that the principle of the interest of the law of the matrimonial domicile is cited for here, is to show that there is at any rate one important distinction between the considerations applicable to the so-called contract of marriage, and a contract in the ordinary commercial sense. The only marriage contract which belongs to this latter class is the marriage contract by which husband and wife dispose of their rights in each other's property, a subject which has already been discussed (g). And there is another distinction between contracts of commerce and contracts of marriage, closely connected with the former one, and arising out of it. It is true that husband and wife enter into an agreement, just as vendor and purchaser do, by which they mutually bind themselves to do something in consideration of the mutual promises then made, but there the analogy ends. The fulfilment or non-fulfilment of the promise of vendor and purchaser, for example, is a matter which is of no public interest whatever; and that either party, on making default, should plead such defences as infancy or the Statute of Limitations is an evil by which no one is legally or even morally wronged but the other party to the agreement. The public, or society (by whichever name the same thing is called), suffers no injury at all, except in the sense that an injury to the individual is an injury to the State, and is therefore prevented, as far as possible, by the law. On the other hand, it is of the greatest moral and social importance to the public interests of every country, for reasons which need not be specified, that those persons who live together within its limits in what they call matrimony, should be married in fact. It cannot be said that the breach or repudiation of a contract within a town is a social or public evil in at all the same sense that the illegitimate connection of the sexes is so; and, at any rate, the breach of a contract is no more a public evil in the place where it is broken than in the place where it was made, in the frequent cases where the contracting parties are not both resident or even present in the place of performance. The crowning anomaly which results from the attempt to regard marriage as a contract in the legal sense of the term is to be found in the fact that it is a contract, if a contract at all, for the breach of which no action can lie, and no damages be recovered (h).

The considerations urged above are perhaps the most obvious reasons why the principles which the Court of Appeal have

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(g) *Supra*, pp. 348 *seq.*

(h) The breach of a promise to marry is obviously a different thing.

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decided in *Sottomayor v. De Barros* are proper to decide the question of the capacity of the parties to a marriage, should not be extended, as some passages of the judgment in that case seem to imply they might be, to the question of the capacity of the parties to a commercial contract. What the capacity to marry, or to marry a particular person, really is, will be best seen by reviewing the decisions on the subject, of which *Sottomayor v. De Barros* is the last.

Capacity to
marry—
cases.
*Ruding v.
Smith.*

The first case of any importance in which the question of the capacity of the parties to a marriage appears to have arisen in an English Court was that of *Ruding v. Smith* (1821) 2 Hagg. Cons. 371, argued in the Consistory Court of London before Lord Stowell in 1821. The marriage in this case had been celebrated at the Cape of Good Hope, by the chaplain of the British forces then in occupation of the colony, between British subjects, whose domicile must be assumed to have been British also. The Dutch law at that time was the only established law in the colony, and its continuance had been formally sanctioned, so far as the inhabitants were concerned, by the capitulation. Two objections were taken to the marriage, though scarcely distinguished in the argument—first, that the mere *formalities* required by the Dutch law as the *lex loci celebrationis* had not been complied with; and, secondly, that the parties were not, according to the same law, of an age at which a marriage could be contracted at all without the consent of the parents and guardians, which had not been obtained. Lord Stowell held that the English law was to prevail on both points, on the exceptional ground that the country was under British legal dominion except so far as the capitulation sanctioned the continuance of certain privileges to the conquered, and that the marriage in question had been celebrated between British subjects with the countenance of British authority and British ministration. It may almost be said that Lord Stowell's judgment amounted to a decision that under the peculiar circumstances of the case, and between those parties, the *lex loci* was British, and therefore coincided with the *lex domicilii*. But the second question, being almost identical with that which arose in *Simonin v. Mallac* forty years later, would have raised, if the *lex loci* for those parties had been held to be Dutch, a direct conflict between the *lex loci* and the *lex domicilii* on the question of capacity; and it is therefore interesting to see how Lord Stowell treated it by anticipation. Assuming a case of a marriage in Holland between British subjects domiciled in England, he asks whether an English Court would hold it void because the Dutch law referred to above imposed on the parties an incapacity to enter into it; and

intimates a clear opinion that the requirements of the Dutch law would not in such a case be deferred to here. It is nevertheless plain that the two questions of the formalities of celebration and the capacity to celebrate were not at that stage of his decision clearly separated in his mind, inasmuch as, after referring to the cases decided on the mode of celebration, he expressly guards himself against being supposed to accept Huber's doctrine as to personal capacity impressed once for all by the domiciliary law. "I do not mean to say that Huber is correct in laying down as universally true, that '*personales qualitates, alicui in certo loco jure impressas, ubique circumferri, et personam comitari*'—that being of age in his own country, a man is of age in every other country, be the law of majority in that country what it may" (i). It can hardly be doubted that what the Court of Appeal in *Sottomayor v. De Barros* declared to be a "well-recognised principle of law" with regard to capacity, was not recognised as established by Lord Stowell in 1821.

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In *Conway v. Beazley* (1831), 3 Hagg. Eccl. 639, it was decided, according to the headnote, that the *lex loci contractus* will not prevail when either of the contracting parties is under a legal incapacity by the law of the domicile. Dr. Lushington, in his judgment, confined himself to the case of the same domicile being common to both man and woman, and no light is therefore to be gathered from his decision upon the question, as to which there is obviously room for argument, whether the law of the husband's domicile would be followed in opposition to that of the wife, in a case (for example) where her law forbade, and his permitted, the marriage, or *vice versa*. In comparing the personal capacity or incapacity to marry to the status of legitimacy which was so fully discussed in *Doe d. Birtwhistle v. Vardill* (1826), 5 B. & C. 438, Dr. Lushington undoubtedly went far towards laying the foundation of the decision in *Sottomayor v. De Barros*. It should nevertheless be remembered that the "capacity to marry," which was in question in *Conway v. Beazley*, was simply dependent upon the answer to be given to the inquiry whether the husband was or was not already married at the time of the marriage which it was sought to annul; and it was conceded that he was already married at that time, unless a Scotch divorce was to be held in the eyes of the English law, competent to dissolve a marriage previously celebrated in England (k).

Conway v.
Beazley.

Neither of the above cases appears to have been cited in the *Simonin v. Mallac*.

(i) *Ruding v. Smith* (1821), 2 Hagg. Cons., at p. 389.

(k) *Lolley's Case* (1812), Ross. & Ry. 237; *McCarthy v. De Caix* (1831), 2 Russ. & My. 614; *Warrender v. Warrender* (1835), 2 Cl. & F. 550; and *supra*, pp. 126, 350.

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case of *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67, and the question of the conflict between the *lex loci* and the *lex domicilii* as to capacity was there treated by Sir Cresswell Cresswell almost, if not quite, as a case of the first importance. The marriage which it was there sought to dissolve was one celebrated in England between French subjects domiciled in France, without the formal consents required at their respective ages by French law. In the judgment delivered after deliberation there is again authority directly opposed to the *dictum* of the Court of Appeal in *Sottomayor v. De Barros*, that it is a "well-recognised principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicil." Sir Cresswell Cresswell certainly did not recognise it in 1860, as he says, "*In general, the personal competency or incompetency of individuals to contract has been held to depend upon the law of the place where the contract was made.* But it was and is contended that such rule does not extend to contracts of marriage, and that parties are with reference to them bound by the law of their domicil. This question, of so much importance in all civilised communities, has been largely discussed by jurists of all nations, but they all apply their observations to controversies arising, not in the countries where the marriage was celebrated, but in other countries where it is brought in dispute, and of which the parties were domiciled subjects" (l). The conclusion to which Sir Cresswell Cresswell came, after examining such authorities as were cited before him, was that the *lex loci* must prevail in this as in other cases of contract, and that the fact that the parties were forbidden by their domiciliary law to marry without the consent of certain other persons afforded no ground for a decree of nullity.

*Brook v.
Brook.*

Following almost immediately upon this case came that of *Brook v. Brook* (1861), 9 H. L. C. 193, which was carried to the House of Lords in 1861, and gave rise to a discussion by the highest legal authority of the question now under consideration. The marriage in that case was that of a widower with his deceased wife's sister, both the parties being domiciled in England, but having gone to Denmark for the purposes of the ceremony. Such marriages were prohibited by English law (5 & 6 Will. 4, c. 54) (m), but are valid by the law of Denmark. It was held by the House of Lords that on such a matter the law of the domicil must prevail, and that the marriage was void. The judgment of Lord Campbell (Lord Chancellor) was put upon the ground that

(l) See *Scrimshire v. Scrimshire* (1752), 2 Cons. 395; *Middleton v. Janverin* (1802), 2 Cons. 437; *Compton v. Bearcroft* (1769), 2 Cons. 444, cited by Sir Cresswell Cresswell in his judgment.

(m) Previously to this statute marriages of persons within the prohibited degrees of affinity were voidable only. See now the Act of 1907.

the *essentials* of a marriage contract were to be regulated by the *lex domicilii*, the *forms* by the *lex loci*. The question arises upon this, whether the capacity or incapacity to marry is to be regarded as a form or an essential. It will be further necessary to seek for a definition of capacity, that it may be seen whether the employment of that term in *Sottomayor v. De Barros* was strictly correct or not in a logical sense.

Capacity is obviously in theory a quality—one of those *qualitates personales impressæ* of which Huber speaks—and may be taken as equivalent to a legal power of doing an act which can admittedly be done by some persons. If the act to which the capacity is referred cannot legally be done at all, it is a misuse of words to speak of a legal capacity or incapacity to do it. Speaking in this strict sense, capacity is only remarkable by its absence—it is invariably some *incapacity* that characterises the exceptional case of which the law is called upon to take notice. Full capacity, in short, is the ordinary status or condition of mankind, which can never give rise to criticism or remark; and the only (*n*) logical incapacities which exist in English law are those occasioned by infancy and insanity. A law which purports to impose a *general* incapacity does not impose an incapacity at all; it simply prohibits an act. It is remarkable that, in accordance with this view, the word “capacity” does not actually occur throughout the whole of Lord Campbell’s judgment in *Brook v. Brook*, though it was made the foundation-stone of the decision of the Court of Appeal in *Sottomayor v. De Barros* (*o*).

Leaving out of consideration, therefore, for the present, the word “capacity,” it will be well to consider what are the *essentials* of the marriage contract to which the judgments in *Brook v. Brook* referred. It will be seen on an examination of that case that the only “essential” alluded to was the relation to each other of the parties to the marriage, and the decision of the House of Lords amounted simply to this, that the law of the domicile is the proper law to say whether the *relation between the*

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(*n*) Since the abolition of slavery. The status of a slave formerly involved *incapacities* in the strictest sense of the word.

(*o*) (1877), 3 P. D. 1.—The confusion between the legality or illegality of a particular marriage and the capacity or incapacity of the contracting parties is due mainly to a *dictum* uttered in the judgment in this case: “It is a well-recognised principle of law that the question of personal capacity to enter into any contract is to be decided by the law of the domicile” (at p. 5)—this principle having been applied by the Court also to contracts of marriage.

With regard to this observation, however, see the recent case of *Ogden v. Ogden*, [1908] P. 46, C. A., at p. 74, where the distinction is made clear: “It may be questioned whether that sentence is correct, and whether the question of capacity is really raised at all in such a case; that is to say, where both parties are capable of entering into a marriage, but may not marry each other because such a marriage would be illegal in their own country. That is rather a question of illegality than of capacity.”

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suggested husband and wife is such that a marriage between them can be permitted or recognised. If the domiciliary law holds that a marriage between persons so connected is incestuous or in any other way unlawful, the law of every other country is bound to accept its decision with regard to all persons whose domicile renders them subject to it (*p*). This is the decision in *Brook v. Brook*, but it must not be strained to extend to cases which it does not naturally cover. The domiciliary law must absolutely forbid such marriage, not merely place an impediment in the way of its being contracted. To say, for example, as in *Simonin v. Mallac*, that parties under a certain age shall not marry without the consent of certain other people, is neither to define a natural incapacity (as is done by a law which fixes a given age as the period of infancy for its subjects), nor to declare that a particular sort of marriage is incestuous or unlawful. It is merely the addition of a ceremonial form, the construction of an artificial impediment. On the other hand, where the law of the domicile forbids a marriage between first cousins, as in *Sottomayor v. De Barros*, and declares such to be absolutely unlawful, that amounts to a prohibition against the contracting of such a marriage at all, and is a very different thing from a direction as to the manner in which it may be contracted effectually. The laws of other countries are bound to recognise a prohibition addressed by a domiciliary law to its own subjects, but not to follow its directions for performance. It may be added, that this distinction is not affected by the fact that in *Sottomayor v. De Barros* the Portuguese law would have consented to its own effacement if a dispensation from the Pope had been obtained. Dispensation with a law is in principle a very different thing from compliance with its directions, though in practice the effect of the two may sometimes be similar. In such a case as *Sottomayor v. De Barros*, the law of Portugal does not say that, when first cousins wish to intermarry, they shall obtain the written consent of the Pope to their doing so. It says they shall not marry at all, and such a prohibition by a domiciliary law is not the less complete, as far as other tribunals are concerned, because the same domiciliary law, under certain circumstances, allows itself to be dispensed with.

*Steele v.
Braddell.*

The distinction which it has been attempted in the preceding paragraph to draw between a prohibition of an act, and a direction as to the manner in which it must be performed, is supported

(*p*) Inasmuch as the wife's domicile becomes the husband's upon the marriage, it is the law of his domicile, not hers, which must in all cases be looked to. This appears a necessary conclusion, but there is no express decision: *vide supra*. p. 377.

by the Irish decision of *Steele v. Braddell* (q), referred to with approval by Lord Campbell in *Brook v. Brook*. By the Irish Marriage Act (9 Geo. 2, c. 11) it is enacted that all marriages when either of the parties is under the age of twenty-one, contracted without the consent of the father or guardian, shall be absolutely null and void to all intents and purposes. In *Steele v. Braddell* the marriage was celebrated in Scotland, and the husband, a minor, had not obtained the required consent. A suit was thereupon brought without success by his guardian in the Irish court to annul the marriage, on the ground that the statute created a personal incapacity in its domiciled subjects to contract marriage while minors, in any place, without the consent stipulated for in the enactment. "This," says Lord Campbell (r), "was a marriage between parties, who with the consent of parents and guardians might have contracted a valid marriage according to the law of the country of the husband's domicile, and the mode of celebrating the marriage was to be according to the law of the country in which it was celebrated. But if the union between these parties had been prohibited by the law of Ireland as 'contrary to the law of God,' undoubtedly the marriage would have been dissolved. Dr. Radcliff expressly says that it cannot be disputed that every state has the right and power to enact that every contract made by one or more of its subjects shall be judged of, and its validity decided, according to its own enactments, and not according to the laws of the country wherein it was formed." (How far this latter *dictum* may be regarded as applicable to contracts in the ordinary sense of the word has been considered above (pp. 375-7).) On the same principle it is clear that the provisions of the English Marriage Act (26 Geo. 2, c. 33), as to the previous consents required to render the marriage of minors valid, were not intended to apply to marriages celebrated out of England, any more than the other provisions in that Act as to the necessity for banns or licence. The Act, in Lord Campbell's words, did not touch the essentials of the contract, or prohibit any marriage which was before lawful. It dealt with formalities and celebration alone (s). There is, it is true, one description of prohibition of marriage absolutely which is conceivable, and would amount, did it exist, to an assumption by the law to create an incapacity in the proper sense. It has been suggested that the effect of attainder is to incapacitate the attainted person from contracting a valid marriage at all;

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(q) (1838), Milw. Eccl. Rep. (Ir.) 1. Cf. on this case (as being opposed in certain respects to *Simonin v. Mallac* (1860), *supra*, and *Compton v. Bearcroft* (1769), 2 Hagg. Cons. 430), Westlake, Priv. Int. Law (1922), §§ 21, 25.

(r) *Brook v. Brook* (1861), 9 H. L. C. 215.

(s) *Ibid.*

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but however the law of some foreign countries may regard the attainer of their subjects, it has been decided, first, that attainer by English law does not create even an incapacity to marry in England; and, secondly, that even if it did so, it would not, except by express enactment to that effect, claim any extra-territorial effect, so as to prohibit the marriage of the attainted person abroad (*t*). It is quite clear that whatever claim might be made by the law of a particular country in this respect, it could be entitled to no international or extra-territorial recognition whatever on the double ground that political offences are ignored altogether in non-domestic tribunals, and that a law which imposed an absolute incapacity to marry at all must be opposed to the public policy of every civilised community.

Capacity for
civil con-
tract.

The examination of the foregoing cases on the question of the capacity to contract a marriage, taken in conjunction with the authorities cited above (p. 377), as to the capacity to contract in a commercial sense, shows, it is submitted, that the decision of the Court of Appeal in *Sottomayor v. De Barros* accorded in substance with the authority of precedents, but was expressed in terms not warranted by that authority, and involved *dicta* directly opposed to it. "None of the cases cited," said Lord Campbell in *Brook v. Brook*, "can show the validity of a marriage which the law of the domicile of the parties condemns as incestuous, and which could not, by any forms or consents, have been rendered valid in the country in which the parties were domiciled." It is submitted that that is the only principle upon which *Sottomayor v. De Barros* should have been decided.

It is clear that marriages prohibited by English law are invalid. But it is not so clear to whom such a prohibition is intended to apply. According to Dicey and Keith it is intended to apply to all persons, whether British subjects or not, domiciled in England and to such persons only. This seems to have been the view of the House of Lords in *Brook v. Brook*, and to be the view expressed in *De Wilton v. Montiflore*, [1900] 2 Ch. 481, and *In re Bozzelli's Settlement*, [1900] 1 Ch. 751. It is supported by the New Zealand Deceased Husband's Brother's Marriage Act, 1900, No. 72; the Deceased Wife's Sister's Marriage Act, 1907, and the Deceased Brother's Widow's Marriage Act, 1921. Where a man married his deceased wife's niece, the daughter of her illegitimate brother, it was held by Astbury, J., in *In re Phillips; Charter v. Ferguson* (1918), 35 T. L. R. 98, that the marriage was not validated by the Deceased Wife's Sister's Marriage Act, 1907, since it only validated one specified degree. Following the

(*t*) *Kynnaïrd v. Leslie* (1866), 1 C. P. 389.

decision in *R. v. Inhabitants of Brighton* (1861), 1 B. & S. 447, he declared the marriage null and void.

The doctrine of the prevalence of the *lex domicilii* has, however, been extended, since *Sottomayor v. De Barros* was decided, to the capacity of the spouses to contract with respect to their movable property (*u*). It will be seen by referring to the earlier portion of this treatise, where the general subject of capacity is discussed, that there are reasons for referring all questions arising on marriage to the law of the domicil; and that the question of capacity to enter into an ordinary mercantile contract has not directly arisen since Lord Eldon ruled in favour of the *lex loci* in *Male v. Roberts* (1800), 3 Esp. 163. It has been already pointed out that in *Cooper v. Cooper*, where Lord Halsbury expressed an opinion in favour of the *lex domicilii*, there was no conflict between that law and the *lex loci*, the contract having been entered into in the country of the domicil; and that the point was expressly left open by Lords Macnaghten and Watson (*x*).

The prohibitions of the Royal Marriage Act have been before alluded to, and, inasmuch as they forbid certain marriages without the previous consent of the reigning Sovereign under the Great Seal, clearly ought in principle to be regarded as only imposing an additional formality, which the law of another country would not be justified in requiring when the marriage was celebrated within its jurisdiction. So far as the laws of foreign States are concerned, there is no difference in theory between the consent of a parent or guardian, and the consent of the reigning Sovereign under the Great Seal. But so far as the law of England is concerned, it is clearly competent for it to say that it will regard certain marriages as invalid, wherever celebrated. It cannot compel, or even expect, other States to adopt its view, but it can and does assert its own intention to take it. It can, that is, and does impose a personal incapacity on the members of the royal family, by declaring that it will act upon the supposition that such an incapacity has been imposed. In accordance with this view the House of Lords decided in the *Sussex Peerage Case* (1844), 11 Cl. & F. 85 (*supra*, p. 102) that the provisions of the Royal Marriage Act extended to marriages celebrated out of England, and that the law would not allow its object and intention to be defeated. It is noteworthy that in the opinion of the judge in that case the same distinction is drawn between the essentials and the formalities of a marriage contract, the prohibitive and the directory part of the enactment, already shown to be deducible from *Brook v. Brook* and its cognate cases.

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Marriage
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(*u*) *Re Cooke's Trusts* (1887), 56 L. J. Ch. 637. Cf. *Cooper v. Cooper* (1888), 13 App. Cas. 88, 108.

(*x*) *Supra*, chap. iii. p. 102.

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(b) *Formalities of the Contract.*—The capacity of the parties to a contract having thus been determined, the question next arises, by what law the formalities and ceremonies of the contract are to be regulated. It has been already shown that the rule with respect to the contract of marriage is that the *forms* must depend upon the *lex loci celebrationis* alone (y); and it is undoubted that this is only a consequence of the general principle which applies to contracts generally, of whatever nature and wheresoever celebrated. The formalities and ceremonies, as distinguished from the essentials, which the law of the place of celebration demands for the constitution of a contract are to be tested by that law alone; and if they satisfy it, no other law has a right to demand more, or, in the other event, to accept less (z). So far as regards the formalities of contracts, the maxim of the civil law, "*locus regit actum*," is, with one exception, more apparent than real (the transfer of immovables (a)), adopted by the law of England. The point where a conflict of law does nevertheless arise is the distinction between the requisite formalities of celebration and the requisite proof that the contract was duly celebrated, between the creation of the obligation and the evidence of its existence, between the origin of the liability under the *lex loci* and the procedure required for the remedy by the *lex fori*. This conflict was well indicated in *Huber v. Steiner* (1835), 2 Scott, 304, by Tindal, C.J.: "The distinction between that part of the law of the foreign country, where a personal contract is made, which is adopted, and that which is *not* adopted by our English Courts of law, is well known and established; viz. that so much of the law as affects the rights and merits of the contract, all that relates *ad litis decisionem* (b), is adopted from the foreign country; so much of the law as affects the remedy only, all that relates *ad litis ordinationem*, is taken from the *lex fori* of that country where the action is brought." The principles here acknowledged are also clearly laid down in *British Linen Company v. Drummond* (1830), 10 B. & C. 903, *De la Vega v. Vianna* (1830), 1 B. & Ad. 284, and *Don v. Lippmann* (1837), 5 Cl. & F. 1, over-ruling *Williams v. Jones* (1845),

(y) *Supra*, p. 123; *Brook v. Brook* (1860), 9 H. L. C. 193.

(z) *Benham v. Mornington* (1846), 3 C. B. 133; Story, *Conf. of Laws*, §§ 260, 262; *Leroux v. Brown* (1852), 12 C. B. 801, at p. 824; *Warrender v. Warrender* (1835), 9 Bligh, 110, per Lord Brougham. Cf. *Brinkley v. Att.-Gen.* (1890), 15 P. D. 76; *Ogden v. Ogden*, [1908] P. 46, C. A. It may be here pointed out that if an offer is made in one country and is accepted in another, the contract is deemed to have been entered into in the country from which the acceptance is sent: *Cowan v. O'Connor* (1888), 20 Q. B. D. 640; cf. *Henthorn v. Fraser*, [1892] 2 Ch. 27, C. A. See as to bills of exchange, the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 72.

(a) *Supra*, p. 250; *infra*, p. 393.

(b) *Vide* Bartolus, *Comm. Cod. I. i. 1.*

13 East, 489, in which a contrary view appears to have been taken. It may therefore be regarded as beyond dispute that whatever relates to the enforcement of the remedy sought must be determined by the *lex fori*, the law of the country to the tribunals of which the appeal is made. But when a law, like the English Statute of Frauds (c), makes a particular species of evidence necessary to establish the constitution of the contract which was not foreseen or required by the law of the place of celebration, or rejects evidence which that law would have admitted, it becomes more difficult to determine whether this question belongs peculiarly to the enforcement of the remedy, or to the materiality of the contract. A similar difficulty arises, where the English law, as the *lex fori*, instead of being more stringent than the law of the *locus contractus*, is less so, and admits evidence which would have been rejected in the *forum celebrationis* or *solutionis*, as the case may be. It has been decided, as will be shown immediately, that both these questions belong to procedure, and are to be determined by the *lex fori* alone; and this is so even where the matters to which the unquestionable evidence relates are themselves mere formalities of celebration. The distinction, which it is rather difficult to discern at first sight, appears to be this. The *lex fori* does not attempt to dictate to those who contract beyond its jurisdiction what ceremonies or formalities shall be employed, nor does it examine a contract that is properly evidenced before it, to see whether the forms and ceremonies actually used are such as it is accustomed to. But it has its own rules of evidence as to the manner in which a contract must be proved as a fact, whether, for example, by parol testimony or by writing, and to these it adheres, whatever may have been the requirements of the foreign law. The question of stamped documents is governed by the same considerations. Facts, such as the payment of money to another's use, will be accepted as *proved* by the *lex fori* without the evidence of a foreign stamp (d): but if the law of the place where a contract is made declares that it shall be void unless a stamp is used, it cannot be sued upon or enforced elsewhere. These principles are illustrated by the following cases.

1. First, the *lex fori* prevails, when its rules as to evidence are more stringent than those of the *lex loci celebrationis* or *solutionis*—that is, where it demands evidence which they do not require or rejects evidence which they admit. Thus, in *Leroux v. Brown*

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(c) Cf. *Leroux v. Brown* (1852), 12 C. B. 801, a case in which a contract valid by French law was not enforceable in England because of the absence of a note or memorandum as required by the Statute of Frauds. (See next paragraph.)

(d) *Bristow v. Sequeville* (1850), 5 Ex. 275, 279.

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(1852), 12 C. B. 801, it was held that s. 4 of the Statute of Frauds, providing that no action shall be brought upon certain contracts not evidenced by writing, applied to contracts made abroad. "It is not denied," said Jervis, C.J., "that if s. 4 of the Statute of Frauds applies to the contract itself or to the solemnities of the contract, it cannot be enforced here. I am of opinion that the section in question *applies not to the solemnities of the contract, but to the procedure*, and therefore that the contract cannot be sued upon here." *Acebal v. Levy* (1834), 10 Bing. 376, shows that the Statute of Frauds similarly claims to regulate procedure when in competition, not with the law of the place of celebration, but with the law of the place of performance. That was an action for the non-receipt of goods ordered by the defendant in London from the plaintiff in Spain, the letter conveying the order being an imperfect memorandum within the Statute of Frauds. This case has been cited for the proposition that when there were several parties to a contract, the solemnities which must be satisfied by each are those of the place where he engages himself, and says that the Statute of Frauds applied *because* the defendants wrote their letter ordering the goods in England (*e*). But according to the passage just cited from the judgment in *Leroux v. Brown*, the Statute of Frauds does not apply to solemnities at all. If it did, it is there expressly stated that it would not regulate contracts merely in the right of the *lex fori*, but the very ground of that decision was that it applied, not to solemnities, but to procedure. The real conflict in *Acebal v. Levy* appears to have been between the English law, claiming to regulate procedure as the *lex fori*, and the Spanish law as the *lex loci solutionis*. The contract proved (apart from the question of the Statute of Frauds) was a contract that the plaintiff should load a particular vessel then lying at a Spanish port with nuts at the shipping price of that port. This being done, there was a delivery to the defendant on board his ship in Spain, and though the Court did not consider that there was an acceptance to bind the defendant and take the case out of the Statute of Frauds, yet it is difficult to see how any law but the Spanish can be regarded as the law of the place of performance. The Statute of Frauds was therefore held to apply, not because the defendant promised in England—according to *Leroux v. Brown* it would have been the same wherever he promised—but because its provisions are intended to regulate procedure, and the law of the place of performance of a contract cannot, in an English court, be allowed to compete with it. Thus in *Coombs v. Quiney* (1917), 142

(e) Cf. *Wiedemann v. Walpole*, [1891] 2 Q. B. 534.

L. T. Newsp. 23, where the plaintiff sued here for specific performance of a contract for the purchase of land in the Argentine, valid by Argentine law, but which failed to comply with s. 4 of the Statute of Frauds, it was held that the contract could not be enforced here. It may be stated as a general rule that a contract not enforceable abroad may be sued on in this country if the necessary evidence be brought (f).

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2. When the *lex fori* admits evidence which the *lex loci celebrationis* would have rejected (g), the facts will be taken as sufficiently proved, but if they disclose that the solemnities required by the *lex loci celebrationis* were not fulfilled, then in accordance with that law the contract will be held void. Thus, it is now established that a written contract which does not bear the stamp required by the law of the place where it was made cannot be sued upon in England (h), though the opposite view had formerly been taken (i), on the ground that the revenue laws of a foreign State need not be regarded. But in *Bristow v. Sequeville* a receipt proving the payment of money to the use of another was admitted in evidence, though without the stamp required by the law of the *locus actus*; and although this decision has been criticised it is submitted that it is in perfect accordance with the principles of *Alves v. Hodgson* and *Clegg v. Levy*. The *lex loci actus* no doubt said that such a receipt, unstamped, should not be admitted to prove the payment. That, in the opinion of Lord Cranworth, was a pure question of procedure, and so far it is difficult to see how a contrary opinion could be maintained. The payment to the use of another being thus proved *as a fact*, where was the contract? The contract was one implied by law, begotten by the law out of that fact. It was a contract which would be implied as well by the foreign law as by the English, if the

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(f) *Hansen v. Dixon* (1906), 96 L. T. 32. Cf. *Brown v. Thornton* (1837), 6 A. & E. 185 (a copy of a charterparty made in Batavia is not admitted in evidence here, though in certain circumstances it would have been admissible in the Batavian Courts); *Finlay v. Finlay and Rudall* (1862), 31 L. J. P. M. & A. 149 (a certificate of marriage in a foreign country admissible there was held not admissible here owing to non-compliance with English requirements). See also *Abbott v. Abbott and Godoy* (1860), 29 L. J. P. M. & A. 57.

(g) As to the distinction between the *lex loci* and the *lex fori*, cf. *Adams v. Clutterbuck* (1883), 10 Q. B. D. 403 (where a lease of Scotch shooting valid in Scotland without seal was held actionable in England).

(h) *Alves v. Hodgson* (1797), 7 T. R. 241 (a promissory note void by foreign law for want of a stamp was held not admissible in evidence here); *Clegg v. Levy* (1812), 3 Camp. 166; *Bristow v. Sequeville* (1850), 5 Ex. 275, per Lord Campbell. The point seems to have arisen in *Legrelle v. Davis*, 5 L. T. 54, where a rule *nisi* was obtained on the ground that the stamp of the *locus celebrationis* was necessary, but the case is not further reported. With respect to bills of exchange, it is now expressly enacted that a bill issued abroad shall not be invalid by reason only that it is not stamped in accordance with the law of the place of issue (45 & 46 Vict. c. 61, s. 72). See the section, *infra*, p. 463.

(i) *James v. Catherwood* (1823), 3 Dowl. & Ry. 190; *Wynne v. Jackson* (1826), 2 Russ. 351.

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facts which rendered the implication necessary were sufficiently brought before it. The rules of procedure of the foreign law prevented it from accepting the facts, but the rules of procedure of the English law did nothing of the kind; and therefore the English law was able to make the implication which the foreign law did not.

The doctrine that the formalities of a contract depend in all cases upon the law of the place of celebration, and that the validity of the obligation will be recognised by no Court if these preliminaries have not been complied with, is not at all impeached by the judgment in the case of *Ex parte Melbourn* (1870), 6 Ch. 64. There the law of Batavia, where the contract was executed, required that any contract made on marriage, by which property was settled on the wife separately, should be registered, *in order to have any effect as against third parties*. It was held in substance that this was not a formality preliminary to the validity of the contract, but a provision as to the future remedies of the creditors of the husband, in the event of his assets being administered in bankruptcy. It will be seen elsewhere that in bankruptcy all priorities between creditors are regarded as matters of procedure, which the *lex fori* alone is entitled to decide (*k*). But where the law of the matrimonial domicile, which had been expressly adopted by the parties to regulate their rights in each other's goods, required that in any post-nuptial contract entered into by the wife respecting her movable property, there should be as many original instruments as there were distinct parties, a contract executed by her in England was held valid, though these formalities had not been complied with (*l*). No law can prevent competent parties from contracting validly according to the *lex loci*; though persons may, of course, contract themselves out of such a power in reference to a particular subject-matter.

The effect of formalities not required or recognised by the *lex loci*, but voluntarily adopted by the parties, would seem to be a question of intention. Where two persons enter into a contract under seal, in a country whose law does not distinguish between specialty and simple contract, the natural inference is that they have in their minds some other law which does draw that distinction. If their domicile or even nationality were English, it would be reasonable to assume that they were contracting with reference to English law. The statute of limitations for specialties has been applied in England to a case of this description, thus extending the term within which the contract could be sued on

(*k*) *Pardo v. Bingham* (1869), 6 Eq. 485.

(*l*) *Guépratte v. Young* (1851), 4 De G. & Sm. 217.

from six to twenty years; but this case is better regarded as an illustration of the principle that procedure is regulated by the *lex fori* (m).

With respect to the formalities attending the indorsements of bills of exchange, it will be seen later (see pp. 463-4), that the Bills of Exchange Act, 1882, enacts that these shall be referred to the law of the place of indorsement (45 & 46 Vict. c. 61, s. 72). The cases prior to that statute were in conflict, it having been more than once held that the acceptor's contract was to pay on an indorsement valid by the law of the place of acceptance, or, at any rate, that the question was one of intention (n). As against the *indorser*, there is no authority for saying that the ordinary rule does not apply which requires that the formalities required by the *lex loci celebrationis* should be satisfied.

The one undoubted exception in English law to the maxim "*locus regit actum*," as applied to the formalities of contracts, is the result of the principle which claims supremacy for the *lex situs* in all that relates to immovables. That principle was laid down clearly by Lord Mansfield in *Robinson v. Bland* (1760), 2 Burr. 1079 (o), and even older authorities to the same effect are found with respect to wills (p). "In every disposition or contract," says Lord Mansfield, "where the subject-matter relates locally to England, the law of England must govern, and must have been intended to govern. Thus, a conveyance or will of land, a mortgage, a contract concerning stocks, must all be sued on in England, and the *local nature of the thing requires them to be carried into execution according to the law here*." A similar doctrine was adopted in *Waterhouse v. Stansfield* (1852), 10 Hare, 254, where the effect of the Demerara law was considered as to land in Demerara, and it was held that a local statute, purporting to restrain the alienation by a debtor of any immovable property without the assent of his debtors, express or implied, and without certain prescribed forms intended to secure this object, must prevail to exclude the claim of an English assignee of the equitable interest in such land.

The deviation from the rule of *locus regit actum* with regard to immovables, which has just been stated, is explained by Westlake (q) as the necessary result of the peculiar character of the

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Transfer of
immovables
—contracts
for.

(m) *Alliance Bank of Simla v. Carey* (1880), 5 C. P. D. 429; *infra*, chap. x.
(n) *Lebel v. Tucker* (1867), L. R. 3 Q. B. 77; *Smallpage's Case* (1885), 30 Ch. D. 598; *contra Bradlaugh v. De Rin* (1868), 5 C. P. 473. See these cases discussed by Lindley, M.R., and Kay, L.J., in *Alcock v. Smith*, [1892] 1 Ch. 238, 264, 269.

(o) Cf. *Waterhouse v. Stansfield* (1852), 10 Hare, 254; *Adams v. Clutterbuck* (1883), 10 Q. B. D. 403.

(p) *Borey v. Smith* (1682), 1 Vern. 85; *Coppin v. Coppin* (1725), 2 P. Wms. 293. Cf. Westlake, *Priv. Int. Law* (1922), § 169.

(q) *Priv. Int. Law* (1922), p. 9.

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English land law. It is not acknowledged by continental jurists, though as firmly established in Scottish and American law (r) as in our own, and it may be perhaps more correctly regarded as one of the essential differences between the real property law of England and that of foreign countries, than as a consequence of those differences. There is an obvious difficulty in selecting one of concurrent phenomena as the result of the others, and it is a safer theory to assume for all a common parentage. It is quite true, as Westlake says, that the English law “cannot possibly recognise a transfer of land, which, made in a foreign form, might contemplate estates, rules of succession, and other incidents of property so strange to its system that even the words in which they were expressed might be incapable of an English interpretation.” But it cannot be assumed that it was for that reason—a reason of convenience only—that the English law has always rejected foreign transfers of English land. The real cause was more probably the spirit of exclusion which has applied the *lex situs* in England to every conceivable question affecting the soil—to the question of succession, for example, and of the legitimacy of the heir (s). “*Nullus princeps legitimat personam ad succedendum in bona alterius territorii*,” are the words of D’Argentré (t), and it can scarcely be doubted that the exclusiveness of the feudal law in this particular was due to higher considerations than the difficulty of translating a foreign conveyance, or of interpreting the meaning of a foreign legal practitioner.

English
stamp laws.

The cases in which an *English* stamp is required, on documents executed out of the United Kingdom, are now indicated by 33 & 34 Vict. c. 97, s. 17, which enacts that no instrument executed in any part of the United Kingdom, or relating, *where-soever executed*, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom, may be pleaded or given in evidence (except in criminal proceedings) or be admitted as good or available in law or equity, unless it is duly stamped in accordance with the law in force at the time when it was first executed. And by s. 15 of the same Act provision is made for stamping, without penalty, instruments made abroad, within two months from their being brought into the United Kingdom. Thus, a contract made abroad requires an English stamp, if the subject-matter or place of performance be in England. If the law of the place of celebration declared that all contracts made within its jurisdiction should be void without the local stamp, such contracts as those referred to in 33 & 34

(r) Story, Conflict of Laws, § 727.

(s) *Birtwhistle v. Vardill* (1826), 5 B. & C. 438; 2 Cl. & F. 571.

(t) Art. 218, 6, n. 20.

Vict. c. 97, s. 17, would apparently require a *double* stamp, the foreign as well as the English, according to the principles already explained as deducible from *Alves v. Hodgson*, *Clegg v. Levy* and *Bristow v. Sequeville*.

It is to be noticed that an older statutory provision (1 & 2 Geo. 4, c. 55, s. 1) on this subject now repealed by 33 & 34 Vict. c. 97, contained explicit language preventing this result, by an enactment that "every deed, agreement, or other instrument relating to any real or personal property in Great Britain or elsewhere than in Ireland, or to any matter or thing (other than the payment of money) to be done in Great Britain or elsewhere than in Ireland, shall be chargeable with such stamp duties as are or shall be payable, by the laws for improving and regulating the stamp duties in Great Britain, and *not with any other stamp duty: Provided always that every such deed, agreement, or other instrument shall be charged and chargeable with such stamp duties accordingly, and no more, whether the same shall be engrossed and executed at any place or places within the United Kingdom, or at any place or places not within the United Kingdom, and whether any of the parties to such deed, agreement, or other instrument shall be resident in or executing the same at any place either in Great Britain or Ireland or elsewhere.*"

This language was no doubt clear enough, although its effect may have been doubtful, but the whole Act was repealed in 1870 (33 & 34 Vict. c. 97), and the new enactment contained in 33 & 34 Vict. c. 97, s. 17, which has already been cited, contains no equivalent provision. S. 3 of the last-mentioned statute does, it is true, enact that there shall be charged upon the several instruments specified in the schedule to the Act, "*the several duties in the said schedule specified, and no other duties.*" The effect of this general provision, may, however, well be doubted. It is clearly not a law intended to render the imposition of duty by the *lex loci celebrationis*, in the cases covered by s. 17, illegal; and it is more than arguable that it amounts to no more than an enactment that no other duties are to be imposed by *English law* (u). Are they not, however, to be recognised by an English Court, when duly imposed by a foreign law, competent according to the rules of international jurisprudence to impose them? It is submitted that they are, and that if a contract were made abroad in a country the law of which declared that all contracts should be void if made within its limits without the local stamp, it could not, though requiring an English stamp under s. 17 of the Stamp

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(u) It is to be noted that, according to the preamble, the object of 1 & 2 Geo. 4, c. 55, was to remove doubts in cases where the stamp laws of England and Ireland came into competition.

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Act, 1870, be sued upon in an English court without the foreign stamp as well, notwithstanding the provisions of s. 3.

It should be remarked that, apart from these statutory provisions, no duty was chargeable, according to the earlier Stamp Acts, on agreements not made within Great Britain. S. 2 of the Stamp Act, 1815 (55 Geo. 3, c. 184), enacts that the duties specified in the Act shall be raised, levied, and paid unto and for the use of the Crown, *in and throughout the whole of Great Britain*, for and in respect of the instruments, matters, and things mentioned in the schedule. Accordingly, it was held by Lord Kenyon in *Ximenes v. Jacques* (1795), 1 Esp. 309, that for an agreement made on board a ship at sea, a stamp was not required. The stamp was always, however, essential if the agreement was actually made in England, whatever might have been the place of performance, or the *situs* of the subject-matter (*y*). These decisions were upon the earlier Stamp Acts, but the language of 33 & 34 Vict. c. 97, s. 17, cited above, is even less ambiguous. "No instrument executed in any part of the United Kingdom . . . shall, except in criminal proceedings, be pleaded or given in evidence, or admitted to be good, useful, or available in law or equity, unless it is duly stamped in accordance with the law in force at the time when it was first executed."

Stamps on
bills of
exchange.

Until the passing of the Stamp Act, 1870, the stamps on foreign bills of exchange were regulated by 17 & 18 Vict. c. 83, which provided (s. 3) that a stamp should be necessary on all bills drawn out of the United Kingdom, whenever they should be paid, indorsed, transferred, or otherwise negotiated within the United Kingdom. No stamp was required on bills drawn abroad and payable in this country until this enactment; but the stamp required is not of course made a *formality* of the original contract by such statutory provisions. It does, however, become a formality of the contract between the indorser and indorsee if the bill is indorsed in England, and then is governed as such by the *lex loci*. If, therefore, the indorsee sued the indorser in a foreign court on a foreign bill, the indorsement having taken place in England, and it appeared that the English stamp had not been affixed, the foreign Court should in strictness refuse to recognise the indorser's liability; though *secus*, it would appear, if the English statute merely said that the bills and indorsement should not be *given in evidence* without the English stamp (*z*). The Stamp Act, 1870, repealed the provisions of 17 & 18 Vict. c. 83, on this subject, but re-enacted them in another form. By s. 51 it

(*y*) *Wright v. Commissioners of Inland Revenue* (1855), 11 Ex. 458; *Stone-lake v. Babb* (1770), 5 Barr. 2675.

(*z*) *Bristow v. Sequeville* (1850), 5 Ex. 275; *Alves v. Hodgson* (1797), 7 T. R. 241.

is provided that every person into whose hands any bill or note made out of the United Kingdom comes shall, before he presents for payment, or indorses, transfers, or in any manner negotiates or pays such bill or note, affix thereto a proper adhesive stamp and cancel the same. S. 54 imposes a penalty of £10 on every person who issues, indorses, transfers, negotiates, presents for payment, or pays any bill or note liable to duty and not stamped; and further enacts that the person who takes or receives from any other person any such bill or note unstamped shall not be entitled to recover on the same, or to make the same available for any purpose whatever. These provisions appear to go far beyond any mere regulations of evidence and procedure, so that the principle of the judgment in *Bristow v. Sequeville* would not apply to them if, under the circumstances just supposed, an English indorsee were to sue the indorser in a foreign court. The question as to what amounted to indorsement, negotiation, or transfer, under the earlier statute, arose in *Griffin v. Wetherley* (1868), 3 Q. B. 753. When, however, a foreign bill of exchange which has been transferred or negotiated in England is sued on in an English court, if the stamp appear to be on it at the time of the trial, it will be presumed, in the absence of evidence to the contrary, to have been there when the bill was transferred to the holder (a). As to the necessity for foreign stamps, it is now enacted by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 72, that a foreign bill is not invalid by reason only that it is not stamped in accordance with the law of the place of issue. This is in accordance with the general principle, by which the revenue laws of one State are not enforced by the Courts of any other. "Although from the comity of nations the rule has been to pay respect to the laws of foreign countries; yet for the general benefit of free trade, revenue laws have always been made the exception" (b).

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(c) *Legality of the Contract.*—Wide as the operation necessarily is which is given to the *intention* of the parties to a contract, it is plain that it can have no effect upon the question of the legality or illegality of the thing contracted for. No law can permit itself to be evaded, nor can it, consistently with the principles of international jurisprudence, sanction the evasion of a foreign law. Thus, if the thing contracted to be done is illegal by the law of the place of the intended performance, the contract

Illegal
contract.

(a) *Bradlaugh v. De Rin* (1868), 3 C. P. 286.

(b) Per Lord Campbell, C., in *Emperor of Austria v. Day* (1861), 3 De G. F. & J. 217, 242. Cf. *Alves v. Hodgson* (1797), 7 T. R. 241, and *Bristow v. Sequeville* (1850), 5 Ex. 275; *James v. Catherwood* (1823), 3 D. & Ry. 190; *Indian and General Investment Trust, Ltd. v. Borax Consolidated, Ltd.*, [1920] 1 K. B. 539.

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should be held void, wherever it was actually entered into, by all Courts alike (c). Where, however, it is the contract itself, the exchange of a certain consideration either for any or for a certain promise, that one of the competing laws claims to forbid, the question assumes a different form. In such a case it would seem that the legality of the agreement must be decided by the law of the place where it is made. It appears clear, at any rate, that a contract illegal by that law will not be recognised or adopted by the English Courts; though the converse case, where a contract was legal where made but is forbidden by English law, may often prove a more complex one. No tribunal can of course be called upon to sanction or enforce any agreement which is contrary to its own notions of justice or morality (d).

Performance
illegal by
lex loci
celebrationis.

First, therefore, with regard to performance, where the thing contracted to be done is illegal by the law of the place where it is intended to do it, the contract is void in all courts alike. This is only in accordance with the general principle that all questions relating to the mode, time, or conditions of performance are to be determined by the law of the place where the parties have agreed to perform (e); and, subject to one exception to be presently noticed, the rule is firmly established, though the English authorities on the point are scanty. Thus, an agreement, to be carried into effect in this country, which would be void on the ground of champerty if made here, is not the less void because made in a foreign country where such a contract would be legal, and with a domiciled subject of that foreign country (f). In *Branley v. South Eastern Railway Company* (1862), 12 C. B. (N.S.) 63, the distinction between a case of this kind, and one

(c) This proposition, says Dicey, though plausible and within certain limits sound, is open to several objections. First, it is extremely difficult to separate questions as to the validity from questions as to the effect of the terms of a contract, and impossible to maintain that the proper law of a contract is always fixed by the *lex loci solutionis*. Secondly, it is inconsistent with authoritative English decisions. Thirdly, the theory that the *lex loci solutionis* governs the validity is opposed to the whole thought pursued by English Judges, who in determining whether an agreement is English or foreign take into account both the terms of the contract and all the circumstances of the transaction and then hold that the effect and the validity is governed by the law of such country. *Conflict of Laws* (1922), pp. 859—65.

(d) Cf. *Re Fitzgerald, Surman v. Fitzgerald*, [1904] 1 Ch. 573, C. A., which discusses the distinction between contracts invalid for some definite reason and those expressly forbidden by positive law or contrary to notions of public policy or morality. See also *Re Bonacina, Le Brasseur v. Bonacina* (1912), 28 T. L. R. 508, C. A.; *Saxby v. Fulton* (1908), 99 L. T. 92—affirmed, [1909] 2 K. B. 208, C. A.; *Kaufman v. Gerson*, [1904] 1 K. B. 591, C. A. (an agreement between persons domiciled in France obtained by moral coercion, and said to be valid there, held to be unenforceable here).

(e) *Branley v. South-Eastern Ry. Co.* (1862), 12 C. B. (N.S.), at p. 71, per Tindal, C.J., in *Trimbey v. Vignier* (1834), 4 M. & S. 695, 704, *infra*.

(f) *Grell v. Levy* (1864), 16 C. B. (N.S.) 73. So a provision in a Scotch settlement against alienation has been held inoperative in England (*In re Fitzgerald*, [1903] 1 Ch. 933).

where the element of illegality does not touch the performance of the agreement, is clearly seen. The question was, whether the railway company, which was directed by English statutes to charge uniform rates for carriage, could impose an increased charge upon "packed parcels" received at Boulogne for conveyance to London; such an increased charge having been pronounced by the Courts illegal when the contract was made in England (g). What the company contracted to do in that case was to carry a packed parcel, part of the journey being in England; and as there was no illegality in carrying packed parcels in England, it appears to have been rightly decided that the contract made in Boulogne for an increased rate of payment on such articles could be recognised by English law. "As a general rule," said Erle, C.J., "the *lex loci contractus* governs in deciding whether there was illegality in the contract; and according to the law of France there was nothing illegal." This *dictum* must, according to the principle now under consideration, be qualified by regarding the "general rule" as applicable to the illegality of the contract itself, and not of its performance merely. It may indeed be supported in another sense, by remembering that when a question of performance arises the *lex loci contractus* is the law, not *loci celebrationis* but *solutionis* (h). In *Heriz v. Riera* (1846), 11 Sim. 318, an agreement had been made in Spain between a merchant and an officer of the Spanish Government, which the fiduciary position of the latter rendered void by the Spanish law. The plaintiff alleged a renewal and repetition of the contract out of the Spanish dominions, an allegation which was held to be unsupported by sufficient evidence. In *Pattison v. Mills* (1828), 1 Dow. & Cl. 342, a contract of insurance was made in Scotland by the agent of an English insurance company for granting a marine policy in London, during the operation of the statute (6 Geo. 1, c. 18), which conferred upon certain other companies a monopoly of marine policies of insurance. It was held that the agreement, notwithstanding, could be sued upon; partly upon the ground that the statute was not intended to apply to Scotland, or to a contract to insure Scottish property entered into in Scotland; partly upon the hypothesis that England was not necessarily the country of performance, and that a policy in accordance with the contract might even have been granted in Scotland. In *Robinson v. Bland* (1760), 2 Burr. 1078, Lord Mansfield went beyond the principle under discussion, and expressed an opinion that a bill given in France for a gaming debt, and payable in England, was subject to the English law as

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Performance
illegal by
lex loci
solutionis.

(g) *Parker v. Great Western Ry. Co.* (1856), 7 M. & G. 253; 11 C. B. 545; *Crouch v. Great Northern Ry. Co.* (1856), 11 Ex. 742.

(h) Cf. *Moulis v. Owen*, [1907] 1 K. B. 746, C. A.

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that of the place of performance, and that the holder could not recover. "The law of the place of contract," said Lord Mansfield, "can never be the rule, where the transaction is entered into with an express view to the law of another country as the rule by which it is to be governed." It has been already pointed out that the question of illegality in the performance comes within the general rule enunciated by Story, that where the contract is either expressly or tacitly to be performed in another place, the contract, in conformity to the presumed intention of the parties, is to be governed, as to its validity, nature, obligations, and interpretations, by the law of the place of performance (*i*). It is probably on this ground that the decision in *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, ought in theory to be supported. In that case it was held that an English Court would not enforce a contract void by English law as against public policy, though made in a country where no such rule existed. It is, however, apparent from the facts of that case that the contract (which was said to be in restraint of trade) was intended to be performed partially, if not wholly, in England (*k*). And just as any connection with an illegal object is held sufficient in municipal law to vitiate a contract (*l*), so it is not necessary for the application of this principle to private international law that the contract to which exception is taken should be expressly to do some action prohibited by the law of the place of intended performance. Thus, in *Waymell v. Read* (1794), 5 T. R. 599, the vendor of goods intended to be smuggled into England, who had lent himself to the unlawful intention by packing them in a particular way, was held unable to recover their price (*m*); though, in *Holman v. Johnson* (1775), Cowp. 341, and *Pellecat v. Angell* (1835), 2 C. M. & R. 311, under somewhat similar circumstances, a vendor who had a knowledge only of the illegal design, to the furtherance of which he had not himself contributed, was not debarred from suing. The two last-mentioned decisions have been much criticised, and exception can no doubt be taken to the reasoning of Lord Abinger in the latter. "The distinction is, when he takes an actual part in the illegal adventure, as in packing the goods in prohibited parcels or otherwise, there he must take the consequences of his act. But it has never been

Illegal object
of contract—
complicity in.

(*i*) Story, § 280; 2 Kent, Comm. Lect. 393.

(*k*) It is suggested that an analogous explanation may be given of *Lee v. Abdy* (1886), 17 Q. B. D. 309. An assignment between husband and wife is in one sense "performed" in the place of the matrimonial domicile where its consequences follow.

(*l*) See note to *Collins v. Blantern* (1767), 1 Sm. L. C. 355, and per Tindal, C.J., in *De Begnis v. Armistead* (1833), 10 Bing. 110.

(*m*) See *Lightfoot v. Tennant* (1796), 1 B. & P. 551; *Biggs v. Lawrence* (1789), 3 T. R. 454.

said that merely selling to a party who means to violate the laws of his own country is a bad contract The plaintiff sold the goods; the defendant might smuggle them if he liked, or he might change his mind next day; it does not at all import a contract, of which the smuggling was an essential part." In contrast with this the language of Eyre, C.J., in *Lightfoot v. Tennant* (1796), 1 B. & P. 551, may well be placed. "Upon the principles of the Common Law, the consideration of every valid contract must be meritorious. The sale and delivery of goods, nay, the agreement to sell and deliver goods is *prima facie* a meritorious consideration to support a contract for the price. But the man who sold arsenic to one who he knew intended to poison his wife with it, would not be allowed to maintain an action upon his contract. . . . Other cases where the means of transgressing a law are furnished with knowledge that they are intended to be used for that purpose will differ in shade more or less from this strong case; but the body of the colour is the same in all. No man ought to furnish another with the means of transgressing the law, knowing that he intends to make that use of them." Here the contract was in direct violation of the Statute 7 Geo. 1, c. 21, s. 2. The tendency which was exhibited, in the cases referred to above, to extenuate participation not indicated by overt acts in intended smuggling, is no doubt due to another theory, which has established itself with much firmness in English jurisprudence, that the obligations of revenue laws have less claim to respect than any other legal commands. The distinction between *malum quia prohibitum* and *malum in se* has nowhere taken a more powerful hold upon the legal imagination. Its effect in extenuating passive participation in the breach of our own revenue laws has been already indicated; but it has had a wider operation still with regard to those of foreign countries; and in more than one case it has been held that an act declared illegal by a foreign revenue law as the law of the intended place of performance is not illegal at all, but can be validly contracted for in England. Thus, a contract made in England to defraud the revenue laws of Portugal was supported by Lord Hardwicke (n); and a contract to insure a ship intended to engage in trade with a Spanish colony forbidden by the mother country was recognised upon the same principle by Lord Mansfield (o). Modern writers have, however, concurred in condemning these decisions, and, though the theory is firmly

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(n) *Boucher v. Lawson* (1734), Cas. temp. Hard. 85, 191.

(o) *Lever v. Fletcher* (1780), Park. Mar. Ins. i. 506. See also *Sharp v. Taylor* (1848), 2 Phill. 801; *Simeon v. Bazett* (1813), 2 M. & S. 94; *Bazett v. Meyer* (1814), 5 Taunt. 824.

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Legality.Illegality of
agreement.

established in America also, it can hardly be assumed that they will be followed in the event of the question again arising here (*p*).

Secondly, the question of legality may arise with reference to the contracting of the agreement, and not to its performance. The consideration, on one side or the other, may either be an unlawful thing in itself to exchange for any promise, or unlawful with reference to the particular promise for which it is given. There is no authority for saying that the question of legality, in such cases as these, is determined by any other law than that of the place where the contract is entered into, except the *dictum* in *Robinson v. Bland*, which has been already mentioned. In *Quarrier v. Colston* (*q*) the plaintiff was held entitled to sue in England for money lost and lent at gaming on the Continent, where there was no law prohibiting such practices; and no *lex loci solutionis* to compete with the *lex loci celebrationis*. This was followed in *Saxby v. Fulton*, [1909] 2 K. B. 208, where it was held by the Court of Appeal that the enforcement of a loan for the purpose of gaming in a foreign country, where such gaming is legal, is not contrary to the policy of English law. These decisions are valuable as showing that Lord Mansfield's expression of opinion in *Robinson v. Bland* is practically overruled. Had the gaming transactions taken place in England, the whole consideration for the debt would have been illegal in itself, and one which could not have been lawfully exchanged for any promise. In *Branley v. South-Eastern Railway Company*, *supra*, p. 398, it was conceded that the English statute prohibited the railway company, in England, from contracting to carry "packed parcels" at an increased rate, or from departing under any circumstances from a uniform rate. This promise to carry was therefore an unlawful consideration to exchange, according to English law, for any promise but one, *i.e.*, a promise to pay for the carriage according to the uniform statutory rate. But the performance of the promise, the carriage of the goods, was in no sense prohibited by the law of the place of performance, and the *lex loci celebrationis* was therefore allowed to determine for itself the legality of the interchange of promises; just as in *Quarrier v. Colston* (1842), 1 Phill. 147, the same law was left to pronounce upon the legality of a gaming transaction. If the giving of the consideration for the promise was unlawful in the first instance by the law of the place where the transaction took

(*p*) See Story, § 257; Westlake, Priv. Int. Law, § 213; 1 Chitty, Comm. 83, 84; 3 Kent, Comm. 266, 267.

(*q*) (1842), 1 Phill. 147. See 9 Anne, c. 14, s. 1, and 18 Geo. 2, c. 34, s. 3. But this case was decided before the Gaming Act, 1845 (8 & 9 Vict. c. 109). Cf. *Moulis v. Owen*, [1907] 1 K. B. 746; *Re Fitzgerald, Surman v. Fitzgerald*, [1904] 1 Ch. 573.

place, a renewal of the promise in another country where the contract could lawfully have been made, as by giving new bills in France for a gaming debt previously contracted in England, will not, without fresh consideration, whitewash the original illegality (r).

Contracts regarded as illegal by a State on the ground that they are prejudicial to its own interests or public policy, belong to an exceptional category. Each State must necessarily judge of these for itself. It is, for example, a maxim of English law that private trading with the King's enemies is illegal (s). But it is necessary, in order to invalidate a contract on this ground, that the state of war should actually exist at the time the contract is entered into; and it is not sufficient that it should be contemplated as a probable event (t). It was laid down in *The Mashona* (1900), 10 C. T. L. R. 170, that one of the immediate consequences of the outbreak of hostilities was the interdiction of all commercial intercourse between the subjects of the States at war without the licence of their respective Governments, and this prohibition applied to all persons domiciled within the territories of the belligerent States. In other words, all commercial intercourse between persons "divided by the line of war" is prohibited (see *Kershaw v. Kelsey* (1868), 100 Mass. 561). "The more important applications of this rule in English law," says Pitt Cobbett, are shortly these:—(i) Contracts or other transactions duly entered into before the war between persons who, whatever their nationality, are divided by the line of war, are, in general, merely suspended during the war, as regards the right to performance and the right of suit. Nevertheless, even such transactions will be abrogated (a) if they enure to the aid of the enemy, e.g., an insurance against capture by the British Government, *Furtado v. Rogers* (1802), 3 B. & P. 191; an executory contract involving intercourse with or assistance to the enemy, *Elders & Fyffes v. Hamburg-Amerikanische Paket-fahrt Aktiengesellschaft* (1918), 34 T. L. R. 275; *Rio Tinto v. Bieber & Co.*, [1918] A. C. 260; *Orconera Iron Ore Co., Lim. v. Krupp Aktiengesellschaft*, [1919] 120 L. T. 386; or (b) if they cannot be carried out without some dealing with the enemy, *Esposito v. Bowden* (1857), 7 E. & B. 763; *Potts v. Bell* (1800), 8 T. R. 548; or (c) if they are in their nature incapable of suspension, *Griswold v. Warrington* (1818), 16 John. Rep. 438; *Hugh Stevenson & Sons, Lim. v. Aktiengesellschaft für Carton-*

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(r) *Wynne v. Callander* (1826), 1 Russ. 293.

(s) *The Hoop* (1799), 1 C. Rob. 196; *Potts v. Bell* (1800), 8 T. R. 548; *Bristow v. Towers* (1794), 6 T. R. 35; *Esposito v. Bowden* (1857), 7 E. & B. 779.

(t) *Janson v. Driefontein Mines Co.*, [1902] A. C. 485.

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nagen-Industrie, [1917] 1 K. B. 852; [1918] A. C. 239. (ii) On the other hand, transactions which are entered into between persons divided by the line of war—whether in the nature of trading ventures proper, *The Hoop* (1799), 1 C. Robb. 196, or contracts of any other kind, *Willison v. Patteson* (1817), 7 Taunt. 439—are in general illegal and void; whilst the same invalidity will attach to contracts which, even though not made with alien enemies, are yet in furtherance of such illegal trade or intercourse, *Potts v. Bell*, *supra*. But the rule prohibiting commercial intercourse will not apply where the transaction in question is entered into between persons who, although otherwise enemies, are not in fact divided by the line of war, *Wells v. Williams* (1697), 1 Ld. Raym. 282. Nor does it apply to transactions which are specially privileged or excepted; such as licensed trade and contracts incidental thereto, *Usparicha v. Noble* (1811), 13 East. 332, or contracts for necessities entered into by British subjects held as prisoners of war, *Antoine v. Morshead* (1815), 6 Taunt. 237. With respect to existing transactions and relations the primary rule—which applies to all cases not excluded on some special ground—is that they are suspended during the war both as to their legal effects and, in strict law, as to all rights of suits thereon, but revive on the restoration of peace, *Ex parte Bousmaker* (1806), 13 Ves. 71 (u).

It was contended in *Rio Tinto Co., Lim., v. Dynamit Aktiengesellschaft* and *Rio Tinto Co., Lim. v. Vereinigte Koenig*, [1918] A. C. 260, that since the contracts were in German, made in Germany and to be performed in Germany, they ought to be construed according to German law, and that although such construction might authorise acts injurious to the interests of the United Kingdom so as to be contrary to public policy, yet they ought to be enforced here according to German law. In rejecting this contention both Lord Atkinson and Lord Parker quoted with approval the following passage from Westlake's *Private International Law*, § 215, "where a contract conflicts with what are deemed in England to be essential to public or moral interests, it cannot be enforced here notwithstanding that it may have been valid by its proper law."

By the ancient rule of the common law an alien enemy has no right to sue in our Courts during the war except by special licence or authorisation of the Crown. This right may be implied. Thus in *Princess of Thurn and Taxis v. Moffitt* (1914), 31 T. L. R. 24 an alien enemy who had registered under the Aliens Restriction Act, 1914, was held entitled to sue, and there has never been any doubt that an alien enemy may be sued during the progress

(u) Leading Cases, i. 85—6 (4th ed.), by Bellot (1924).

of hostilities. "And since," said Lord Reading, C.J., in *Porter v. Freudenberg*, [1915] 1 K. B. 857, "he can be sued, it follows that he can appear and be heard in his defence and take all such steps as may be deemed necessary for the proper presentment of his defence. If he is brought at the suit of a party before a Court of justice he must have the right of submitting his answer to the Court. . . . Equally it seems to result that when sued, if judgment proceed against him, the appellate Courts are as much open to him as to any other defendant. . . . Once he is cited to appear he is entitled to the same opportunities of challenging the correctness of the Judge of first instance or other tribunal as any other defendant. The decision in *McVeigh v. United States* (1870), 11 Wall. 259 in the Supreme Court of the United States is to the same effect" (x).

It was held in *Wolf v. Oxholm* (1817), 6 M. & S. 92, by Lord Ellenborough, C.J., that the confiscation of choses in action belong to an alien enemy is contrary to the law of nations. But in *In re Ferdinand, ex-Tsar of Bulgaria*, [1921] 1 Ch. 107, it was declared by Lord Sterndale, M.R., (1) that by the common law the Crown had the right to seize and forfeit to it private property, including choses in action, in this country belonging to alien enemies; (2) that such right had not ceased to exist before the passing of the Trading with the Enemy Acts; (3) that such right had ceased to exist by reason of the Trading with the Enemy Acts; and (4) that the ancient right of forfeiture after inquisition found was merged in the statute. Upon the last ground, therefore, the appellant succeeded. Consequently the prerogative right of the Crown under the common law to seize private property still survives. It is the *method* of confiscation after inquisition found which has been superseded by the statute. It is only the procedure which is changed. But all these topics pertain rather to the domain of Public International Law, and their treatment is contained in works dealing with that branch of the subject (y).

It might perhaps have been doubted how far contracts resulting from gaming might have properly come under the head of those agreements, already referred to, which the law refuses to recognise, wherever they are made and in whatever place they are to be performed, because of their moral turpitude or their injurious effect upon the interests of the State or of society. In *Kaufman v. Gerson*, [1904] 1 K. B. 591, the Court of Appeal refused to enforce a contract made between persons domiciled in France obtained by moral coercion, although said to be legal by

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(x) See judgment of Bailhache, J., to the same effect in *Robinson & Co. v. Continental Insurance Company of Mannheim*, [1915] 1 K. B. 155.

(y) For the effect of war on commercial relations see Pitt Cobbett, ii., pp. 62—125 (4th ed.), by Bellot (1924).

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French law. And in *Société des Hôtels Réunis v. Hawker* (1913), 29 T. L. R. 878, it was held that the payment of a cheque obtained in France from an Englishman under duress, for the purpose of paying a gambling debt of another, could not be enforced in England, although the transaction was lawful in France. It can hardly be said that such cases properly come under the domain of international law at all, inasmuch as the international element in them, if any, is obliterated by the brand of illegality which the law of England, as the *lex fori*, stamps upon them as soon as their real nature is made apparent. Amongst this class may be enumerated all contracts the object of which involves a breach of the national neutrality in time of war, or is calculated to lend assistance to insurgents against a friendly State (z); all contracts for future immorality or illicit connection of the sexes, or based in any other way upon moral turpitude and opposed to the interests of justice (a). Contrary to what might, perhaps, have been expected, a contract for the sale of slaves does not appear to be regarded by the English law as so tainted with turpitude as to be incapable of recognition. That this should have been the view taken when slaves were still held in the British colonies, and regarded there as part of the soil—*ascripti glebæ*—is not, of course, a matter of surprise (b); nor that before the conclusion of a treaty between Great Britain and Spain for the suppression of the slave trade, and the creation of a right of searching Spanish vessels on the high seas with that object (c), it should have been held that a Spaniard, being not prohibited from carrying on the slave trade by the laws of his own country, might recover damages in an English Court in respect of the wrongful seizure by a British subject on the high seas of a cargo of slaves on board his ship (d). The slave trade is not, and has never been, piracy by the law of nations (e), except by convention, and the action therefore was no doubt maintainable. And it was held by the Exchequer Chamber, in *Santos v. Illidge* (1859), 8 C. B. (N.S.) 861, that a contract might be made by a British subject for the sale of slaves, lawfully held by him in a foreign country where the possession and sale of slaves is lawful. The defendants were the directors of an association or

(z) *De Wutz v. Hendricks* (1824), 9 Moo. 586; S. C. 2 Bing. 314; *Thompson v. Powles* (1828), 2 Sim. 194; *Jones v. Garcia del Rio* (1823), 1 T. & Russ. 297; *Yrisarri v. Clement*, 2 C. & P. N. P. C. 223; 3 Bing. 432; *Hennings v. Rothschild*, 9 B. & C. 470; 4 Bing. 315, 335; *Taylor v. Barclay* (1828), 2 Sim. 213.

(a) Com. Dig. Assumpsit, F. 7; *Collins v. Blantern* (1767), 2 Wils. 341, 1 Sm. L. C. 355, notes to this case; *Madrazo v. Willes* (1820), 3 B. & Ald. 353; *Forbes v. Cochrane* (1824), 2 B. & C. 448.

(b) *Smith v. Brown*, 2 Salk. 666.

(c) Wheaton, Int. Law (Lawrence), p. 259.

(d) *Madrazo v. Willes* (1820), 3 B. & Ald. 353.

(e) Wheaton, Int. Law (1904), p. 206.

partnership, consisting of themselves and others, all British domiciled subjects, and were the owners of certain slaves in the Empire of Brazil, where slavery was lawful. The action was brought for breach of a contract of sale, and the question turned mainly upon the proper construction of the English statutes forbidding the purchase, sale, or barter of slaves (5 Geo. 4, c. 113; 6 & 7 Vict. c. 98), the slaves in question having been purchased by the defendants themselves in Brazil after the passing of the former but before the commencement of the last-mentioned Act. In the Court of Common Pleas it was held that the effect of the two statutes, read together, was to prohibit the trade in slaves by all persons within the control of the Legislature, including British subjects all over the world; and it was added, that the fact of the plaintiff being a foreigner did not authorise him to sue in the Courts of this country for the breach of a contract entered into by an English subject in violation of English laws. This judgment was, however, reversed on appeal in the Exchequer Chamber by four Judges to two, on the ground that there was nothing in the English statutes to prohibit a contract by a British subject for the sale of slaves, lawfully held by him in a country where the possession and sale of slaves are lawful. It will be seen that this decision, as did that of the Judges in the Court below, proceeded entirely upon the intention of the English Legislature, as gathered from the proper interpretation of the English statutes; nor was it pretended that a contract for the sale of slaves could be impeached on any other ground. The history of English legislation on this subject gives the real key to the reasons for regarding the subject in a manner so opposed to that which is now supposed to be the spirit of English law. If English law had been always that which it is now, such a contract would no doubt be regarded in itself as something iniquitous and incapable, just as a contract for prostitution, of enforcement in an English Court. But inasmuch as the rights of slave-holders were at one time an integral part of our own law, just as they are still of the law of some other countries, it is plain that only the limitations which have been placed by English statutes on those rights can be recognised by English law, and that a contract which was once legal must still be regarded as valid, except so far as its legality has been taken away by positive enactment. It cannot be asserted that such a contract is so iniquitous that it ought not to be recognised in an English Court, no statute having declared it to be so; and therefore, although such contracts may be *forbidden* by English law, its legality must be tested, not by the *lex fori*, but by the law of the place where

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the contract was made or where it was to be performed, *supra*, p. 382. "In this case," said Bramwell, B., in *Santos v. Illidge*, "the plaintiff sues on a contract made with him, a Brazilian, in the Brazils, which the defendants can lawfully perform there. The defendants refuse to perform it, and give as a reason one which would not be good there, nor probably in any country than this, viz. that the performance of their contract there would be an offence against the laws here, and therefore ought not to be enforced here." The decision of the Exchequer Chamber was in effect that the reason was not in fact good even in England, though it no doubt would have been had the English law said expressly that it should be. "The general run of laws enacted by the superior State are supposed to be calculated for its own internal government, and do not extend to its distant dependent countries; which, bearing no part in the Legislature, are not therefore in its ordinary and daily contemplation" (f). If true of distant dependencies, it is a *fortiori* so with regard to foreign independent States, that a Government, when legislating with regard to acts, does not intend to include acts to be performed within any territorial limits but its own.

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The original rule of English law insisted that where a party by his own contract creates a duty or charge upon himself, he is bound to make it good notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. But this rule has been modified by the decision in *Taylor v. Caldwell* (1863), 3 B. & S. 826, where the contract was held to be dissolved by the distinction of the subject-matter, and by that in *Krell v. Henry*, [1903] 2 K. B. 740, where it was held that the plaintiff was not entitled to recover the balance of rent due for a flat (from which the Coronation processions might be viewed), on the ground that the taking place of the processions on the days fixed was regarded by both parties as the foundation of the contract. After the outbreak of war these modifications were recognised by Lord Wrenbury in *Horlock v. Beal*, [1916] 1 A. C. 486, where he says: "If a party has expressly contracted to do a lawful act, come what will,—if in other words he has taken upon himself the risk of such a supervening cause—he is liable if it occurs, because by the very hypothesis he has contracted to be liable. But if he has not expressly so contracted, and from the nature of the contract it appears that the parties from the first must have known that its fulfilment would become impossible if such a supervening cause occurred, then upon such a cause occurring both parties are excused from performance. In that

(f) 1 Bl. Comm. 101; *Att.-Gen. v. Stewart* (1817), 2 Mer. 143. See *Rousillon v. Rousillon* (1880), 14 Ch. D. 351.

case a condition is implied that if performance becomes impossible the contract shall not remain binding." Here the claim was for wages due to a British seaman, the vessel having been detained on the outbreak of war in a German port and the crew imprisoned. *Held*, that the further performance of the contract had become impossible from the date of the detention of the ship. "The underlying ratio," said Lord Shaw, in this case "is the failure of something which was at the basis of the contract in the mind and contention of the parties." This principle was equally clearly stated by Lord Haldane in *Tamplin Steamship Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.*, [1916] 2 A. C. 397, where he said: "The occurrence itself may . . . be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared and the contract itself has vanished with that foundation." In every case it is now necessary, as Lord Loreburn stated, "to examine the contract and the circumstances in which it was made, not of course to vary it, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. If they must have done so, then a term to that effect will be implied, though it be not expressed in the contract."

But the question remains, by what tests and subject to what limitations is the rule in *Krell v. Henry* to be applied? This question McCardie, J., endeavoured to answer in *Blackburn Bobbin Co. v. Allen & Sons*, [1918] 1 K. B. 540. No indication, he said, had yet been given as to the extent of its application. At the outbreak of the war a vast body of commercial contracts existed which contained no clauses whatever providing for that event. No one can doubt that such contracts had been made upon the assumption that peace would continue. Neither side contemplated the occurrence of war. But, said the learned judge, it could not be contended that all such contracts were dissolved by the events of August, 1914. The mere continuance of peace was not a condition of the contract. The destruction of a state of peace is not of itself a destruction of any specific set of facts within the *Krell v. Henry* rule. Nor can it be that grave difficulty on the part of a vendor in procuring the contract articles will excuse him from the performance of his bargain. If such were the case, then the decision in *Tennants (Lancashire) v. Wilson & Co.*, [1917] A. C. 495, with respect to the *force majeure* clause there in question would have been unnecessary, for the contract would have been dissolved by a basic change of circumstances and the principle of *Metropolitan Water Board v. Dick*,

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Kerr & Co., [1918] A. C. 119, would have applied. After referring to *Spence v. Chadwick* (1847), 10 Q. B. 517; *Lloyd v. Guibert* (1865), 1 Q. B. 115; and *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. 589, the learned Judge asked, If inevitable necessity occurring in this country would not excuse non-performance, why should non-performance be excused on account of the inevitable necessity arising abroad? So to hold would be to alter the liability which English law attaches to contracts, and would in the absence of an expressed or implied intention to that effect be contrary to authority as well as principle. The change of circumstances in *Jacob's Case* was serious and clearly was not foreseen by the parties. In this case, early in 1914 the defendants sold to the plaintiffs Finland birch timber to be delivered free on rail at Hull, deliveries to commence in June and continue till about November. The contracts were not formal, they were created by correspondence and contained no war or *force majeure* or suspension provisions up to the outbreak of war. The defendants had not delivered any timber, and after that event it became impossible to ship timber from Finland direct, as was the pre-war practice. *McCardie, J.*, came to the conclusion that in the absence of any question of trading with the enemy, and in the absence of any administrative intervention by the British Government, a bare and unqualified contract for the sale of unascertained goods will not (unless most special facts compel an opposite implication) be dissolved by the operation of the principle of *Krell v. Henry*, even though there has been so grave and unforeseen a change of circumstances as to render it impossible for the vendor to fulfil his bargain. "He could see no sound distinction between impossibility of foreign law and impossibility created by an outbreak of war involving a complete cessation of transport facilities. Just as it seems clear that a vendor is not absolved from the duty to deliver unascertained goods by reason of the destruction of his factory or warehouse, so a vendor is not relieved from his obligation in such a case as the present." In his view the rule in *Jacob's Case* still held good and covered the present case. This case was also considered by *Bailhache, J.*, in *Ralli Bros. v. Compania Naviera Sotat y Aznar*, [1920] 1 K. B. 614, where the charterparty was an English contract and the agreed freight exceeded the amount allowed by Spanish law. This was a cargo of jute shipped from Calcutta to Barcelona at a freight of £50 a ton, one half to be paid to the owners in London and the balance at Barcelona by the receivers. Owing to alterations in the rate of exchange the freight largely exceeded the £50 a ton, and the receivers refused to pay the balance. *Held*, by *Bailhache, J.*,

that the charterparty was an English contract to be construed by English law, but that with regard to that part which had to be performed in Spain the Courts would have regard to the Spanish law, although the Court in considering whether or not there had been a breach of the contract would regard the matter from the standpoint of English law, and would not admit an excuse which might be valid by Spanish law unless it were also valid by English law; and that inasmuch as the Spanish law imposed an equal disability upon both the contracting parties, the owners not being entitled to receive, nor the charterers to pay, freight in excess, neither party could sue the other for breach of the charterparty in that respect, notwithstanding that the contract was English. The contract also contained an exception clause, in which was included the exception of "restraint of princes." This, said Bailhache, J., was mutual, and the charterers appeared to be protected by their contract whatever be the law applicable to it. The Spanish law constituted such a restraint and consequently the charterers could rely upon the exception as an answer to the shipowners' claim for freight beyond the limit fixed by the Spanish Proclamation.

A similar point arose in *Trinidad Shipping Co. v. Alston*, [1920] A. C. 888, where it was held by the Judicial Committee that an agreement made in British territory by shipowners to allow rebates upon freights for carriage of goods by sea to a foreign country provided they were carried in their ships only, cannot be repudiated, after the goods have been carried and the freights paid, on the ground that payment of the rebates would render the shipowners liable to penalties under the legislation of the foreign country. Here, by the Act of Congress of the United States of September 7, 1916, payment of rebates had become illegal. It was said that at the time of the agreement neither party knew of the Act. By British law, said Lord Parmoor, there is no illegality in a rebate agreement such as this. The contracts have not been frustrated or rendered impossible; on the contrary, all the conditions have been fulfilled.

Commercial frustration of an adventure by delay was defined by Bailhache, J., in *Admiral Shipping Co., Ltd. v. Weidner Hopkins & Co.*, [1916] 1 K. B. 429, as "The happening of some unforeseen delay without the fault of either party to a contract of such a character as that by it the fulfilment of the contract in the only way in which fulfilment is contemplated and practicable is so inordinately postponed that its fulfilment when the delay is over will not accomplish the only object or objects which both parties to the contract must have known that each of them had in view at the time they made the contract and for the accomplishment

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of which object or objects the contract was made." In this case it was provided in a time charterparty that hire was to cease on the happening of certain events, which did not include "restraint of princes." The charterparty also contained a mutual exception clause which included "restraint of princes." As none of the enumerated reasons for cessation of hire had happened and the adventure had not been commercially frustrated, *Bailhache, J.*, held that the charterers remained liable for hire, but he doubted whether, in view of the decision of the House of Lords in *Brown v. Turner, Brightman & Co.*, [1912] A. C. 12, the doctrine of commercial frustration applied to a time charterparty. But in *Lloyd Royal Belge Société Anonyme v. Stathatos* (1917), 37 L. T. R. 71, *Pickford, L.J.*, held that the doctrine of commercial frustration did apply to a time charter as well as to voyage charter, relying upon the doctrine laid down by Lord Haldane in the *Tamplin Case, supra*. It was held that detention of the vessel by the British authorities amounted to a frustration of the commercial adventure under the exemption clause, which included arrests and restraints of princes, and that the contract was dissolved either at the date of detention or when the charterers gave notice that the charterparty was dissolved.

In *Indian and General Investment Trust, Ltd. v. Borax Consolidated, Ltd.*, [1920] 1 K. B. 539, the defendants had guaranteed the payment of the principal money and interest charged upon an American railway which by a deed of trust had agreed that the deed should be construed and the rights of all parties regulated by English law. The United States Government subsequently imposed an income tax upon all income derived by foreign corporations from interest on bonds of corporations resident in the United States. The railway company deducted this tax from the dividends. *Sankey, J.*, held that there is no Act of Parliament which allows payment of income tax to another country to be reckoned as a discharge of an English contract, and that it had been laid down by Lord Kenyon, C.J., in *Smith v. Buchanan* (1800), 1 East, 6, that "it is impossible to say that a contract made in one country is to be governed by the laws of another," and further, that there could not be read impliedly into the contract a stipulation that the plaintiffs agreed that the provisions of the United States Income Tax Acts should be enforceable against them in England. Consequently the American company and the defendant company were not entitled to deduct the United States income tax from the dividends.

(d) *Essentials of the Contract.*—It has been said above (g) that, assuming a contract to be legal, the intention of the parties is material to every question which can arise upon it, except that of their capacity to enter into a legal obligation at all. And the question of the formalities necessary to a contract, which has recently been considered, is not at all an exception to that rule, inasmuch as the parties contracting are presumed to have submitted themselves for certain purposes to the law of the place where the contract is entered into, and to have intended that the formalities required by that law should be fulfilled. It is obvious that every man who contracts at all, if he is a member of a civilised community, must be aware that his contract will be governed, so far as its formalities are concerned, by some system of law or another; and the system of law which will be oftenest in his mind as that which must claim respect, will undoubtedly be the system of law by which all other matters are regulated in the place where he undertakes his legal obligation. To undertake such an obligation something must be done or said there and then, and it is fair to assume that this something will be tested by the same law that regulates all other actions and words in the same locality. Such, accordingly, is presumed by private international law to have been the *intention* of the contracting parties; but when the essentials of the contract are the subject of consideration (to adopt the distinction between forms and essentials which is drawn in *Brook v. Brook* (1861), 9 H. L. C. 193), it is plain that the intention of the parties cannot be so simply entertained. The legality, for example, of the act, or any of the acts, for which the contract stipulates, cannot depend in the mind of the parties, or in reason and fact, upon the law of the place where the promise to do it is given. Whether any act is a lawful one or not must depend entirely, if words have any meaning, upon the law of the place where it is to be done. On this point it is hardly correct to say that the *intention* of the parties is at all material; the law does not, strictly speaking, presume them to have intended anything except obedience to the proper law, whatever that might be; but it does presume them to have known that the legality of every act depends upon the law of the place of intended performance, as a maxim both of jurisprudence and common sense. Again, the nature and extent of the obligation which the contracting

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(g) *Supra*, p. 397. See Dicey, *Conflict of Laws* (1922), note 22, Appendix, pp. 857 *seq.*, as to the law determining the essential validity of a contract, and Baty, *Polarised Law*, pp. 43-8. Cf. also the cases *British South Africa Co. v. De Beers Consolidated Mines, Ltd.*, [1910] 1 Ch. 354, C. A.—reversed on a question of construction, [1912] A. C. 52; *Limerick Corporation v. Crompton & Co., Ltd.*, [1910] 2 I. R. 416, C. A. See, further, *Re Bonacina, Le Brasseur v. Bonacina* (1912), 28 T. L. R. 508, C. A.; *Johannesburg Municipal Council v. Stewart & Co., Ltd.* (1909), W. N. 161, H. L.

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parties take upon themselves must of course be defined and regulated, whether by construction or implication, by some law; and undoubtedly, so long as they propose to stipulate for nothing that is in any sense illegal, the intention of the parties, so far as it can be ascertained, is entitled to decide what law must be referred to for the purpose. If the contracting parties were told beforehand the exact law that was to regulate their contract, they could obviously contract for any lawful object they pleased, by the use of proper forms and proper language. It would then be in fulfilment of their intention to apply the law whose provisions had been in their minds to the contract when made. Now, whether parties to a contract are told or not, they will always assume some law or other as that which is to govern the obligation. The proper law, therefore, to be eventually applied by any tribunal for this purpose is that which will most frequently and most naturally be assumed by ignorant parties to a contract as that by which their liabilities are defined. The principle is well demonstrated by Lord Brougham, speaking of the rule which refers solemnities to the *lex loci*, in *Warrender v. Warrender* (1835), 9 Bligh. 115: "This is sometimes expressed, and I take leave to say inaccurately expressed, by saying that there is a *comitas* shown by the tribunals of one country towards the laws of the other country. Such a thing as *comitas* or courtesy may be said to exist in certain cases, as where the French Courts inquire how our law would deal with a Frenchman in similar or parallel circumstances, and, upon proof of it, so deal with an Englishman in those circumstances. This is truly a *comitas*, and can be explained on no other ground; and I must be permitted to say, with all respect for the usage, it is not easily reconcilable to any sound reason. But when the Courts of one country consider the laws of another in which any contract has been made, or is alleged to have been made, in construing its meaning, or ascertaining its existence, they can hardly be said to be acting from courtesy, *ex comitate*; for it is of the essence of the subject-matter to ascertain the meaning of the parties, and that they did solemnly bind themselves; and it is clear that you must presume them to have intended what the law of the country sanctions or supposes, and equally clear that their adopting the forms and solemnities which that law prescribes shows their intention to bind themselves; nay more, it is the only safe criterion of their having entertained such an intention. Therefore, the Courts of the country where the question arises resort to the law of the country where the contract was made, not *ex comitate*, but *ex debito justitiæ*; and in order to explicate their own jurisdiction by

discovering that which they are in quest of, and which alone they are in quest of, the meaning and intent of the parties.”

In deciding, therefore, upon the proper law to be applied to the essentials of a contract, we must be guided by the intention of the contracting parties; and it will be convenient first to understand clearly what the essentials are, having treated in the preceding pages of the legality of those acts which are forbidden by one and allowed by another of the competing laws. Under the term *essentials* may be classed generally everything which does not come under the description of *forms*. And, taking them in their natural order, these will be :—

- (1) The construction and interpretation of the actual words, parol or written, by which the obligation is constituted.
- (2) The nature and effect of the obligation which results from those words, properly construed and understood, or which is implied by the law from proved or admitted facts, without the use of any language at all.
- (3) The performance of the contract.
- (4) The defeasance or discharge of the contract otherwise than by performance.

(1) *Construction and Interpretation of Contracts*.—The construction and interpretation of contracts being nothing more than the exact definition of what the parties meant by their words (and, in the case of implied contracts, it might perhaps be said, by their silence), appears to depend more absolutely upon the intention of the parties than any other branch of the subject. Now, in those cases where the contract has been executed in a foreign country where the parties to it are domiciled, there can obviously be little or no doubt. The *lex domicilii* is also the *lex loci celebrationis*, and it can hardly be supposed that the parties intended that their language should be interpreted by any other law (*h*). Inasmuch as intention is a question of fact, it is no doubt conceivable that language might be used in such a contract which could be reasonably explained only by the law of the place of performance, but it is difficult to see how such a question of interpretation could arise apart from that of *performance*, which will require separate consideration. Subject to this reservation, it may be fairly assumed that when a contract is made abroad in the country of the domicile of the parties to it, an English Court will interpret its language by that law (*i*). But when the place of execution and the domicile of the parties are different, a further

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(*h*) *Anstruther v. Adair* (1834), 2 My. & K. 513, 516; *Thurburn v. Steward* (1871), 3 P. C. 504.

(*i*) *De la Vega v. Vianna* (1830), 1 B. & Ad. 284; *Cood v. Cood* (1863), 33 Beav. 314.

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and more difficult question arises; nor is it always easy to see which of the competing laws should give way. On this point the language of Story, indeed, is distinct enough, if the decisions cited by him in support of it warranted its acceptance without reserve.

“The general rule, then, is that, in the interpretation of contracts, the law and custom of the place of contract are to govern in all cases where the language is not directly expressive of the actual intention of the parties, but is to be tacitly inferred from the nature and objects and occasion of the contract. The rule has been fully recognised in the Courts of common law; and it has been directly decided by those Courts that the interpretation of the contract must be governed by the laws of the country where the contract is made. And the rule is founded in wisdom, sound policy, and general convenience” (§ 27). The English cases cited in support of this proposition are *Trimbey v. Vignier* (1834), 1 Bing. N. C. 151, *De la Vega v. Vianna* (1830), 1 B. & Ad. 287, and *British Linen Co. v. Drummond* (1830), 10 B. & C. 903, but none of them lays down distinctly that, in cases where the domicile of the parties and the place where the contract was made differ, an English Court will interpret the language of the contract by the law of the latter place in preference to all others. In *Trimbey v. Vignier* it is no doubt said by Tindal, C.J., that the interpretation of the contract must be governed by the laws of the country where the contract was made (*lex loci contractus*), while the mode of suing and the time within which the action must be brought must be governed by the law of the country where the action is brought (*in ordinandis judiciis, loci consuetudo, ubi agitur*). It is plain, however, first, that the conflict of law here referred to was the conflict between the *lex loci contractus* and the *lex fori* on a question which it was contended was one of procedure; and, secondly, inasmuch as the point there decided was that the effect of a blank indorsement in France of a note made in that country must be decided by the French law, it is evident that the question was not one of the interpretation of language at all, but of the nature and effect of the obligation which the language created—a matter which belongs properly to the next heading of the subject. In *De la Vega v. Vianna* the question was also one which was contended to belong to procedure as part of the remedy, and was so held; and in addition to this, both the parties were obviously domiciled in the country where the contract was made. The point is put briefly by Lord Tenterden, C.J., who says: “The plaintiff and the defendant were both foreigners; the debt was contracted in Portugal, and it appears that, by the law of that country, the defendant would not have been liable to arrest. . . . A person suing in this country must take the law as he finds it; he cannot,

by virtue of any regulation in his own country, enjoy greater advantages than other suitors here, and he ought not therefore to be deprived of any superior advantage which the law of this country may confer." It is quite clear that this decision has nothing to do with the principles on which the language of a foreign contract is to be interpreted, and it has been cited as an authority on that point only by reason of a *dictum* quoted in it of Heath, J., in *Melan v. Duke of Fitzjames* (1797), 1 B. & P. 138 (*k*), to the effect that in *construing* contracts the Courts must be governed by the laws of the country where they are made. That too, however, was a case of procedure, in which the *lex fori* claimed to be heard; and the same observation may be made as to *British Linen Co. v. Drummond*, the third case on which Story relies for his proposition, which turned on the applicability of the English Statute of Limitations to a contract made abroad.

The truth appears to be, that the expression "interpretation of contracts" is an ambiguous term, in the sense that it has been used with more than one meaning. Story apparently employs it, as it was in fact employed in one or two of the cases just cited, as comprising the general explanation and definition of the agreement which has been formulated between the parties, the rights arising out of it, and the effect of the relation which it has constituted. It will be obvious that the construction or interpretation of the language of the contract will be included in the phrase so used; and as the necessity of distinguishing the part from the whole did not often arise, authorities on one point were accepted as equivalent to authorities on another. That Story did not mean to lay down an absolute rule, that the law of the place where a contract was made must of necessity decide all questions which may arise on the construction of its language, is plain from what he goes on to add to the language quoted above. "Especially, in interpreting ambiguous contracts, ought the domicile of the parties, the place of execution, the various provisions and expressions of the instrument, or other circumstances implying a local reference, to be taken into consideration."

It can hardly be supposed, therefore, that Story did intend on this question to advocate any imperative rule in favour of the place where the contract was actually executed; and the true principle was laid down by the Court of Appeal in more general language in *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. 589; "What is to be the law by which a contract or any part of it is to be governed or applied must be always a matter of construction of the contract itself as read by the light of the subject-matter and of the surrounding circumstances. Certain presump-

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(*k*) And see *Talleyrand v. Boulanger* (1797), 3 Ves. Jun. 447.

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tions or rules in this respect have been laid down by juridical writers of different countries and accepted by the Courts, based upon common sense, upon business convenience, and upon the comity of nations; but these are only presumptions or *prima facie* rules, that are capable of being displaced wherever the clear intention of the parties can be gathered from the document itself and from the nature of the transaction. The broad rule is that the law of a country where a contract is made presumably governs the nature, the obligation, and the interpretation of it, unless the contrary appears to be the expressed intention of the parties ” (l). In other words, the intention of the parties must govern; and the parties will be presumed to have intended the *lex loci celebrationis*, unless the contrary be shown. In particular classes of contracts certain presumptions naturally arise; as, for example, in a marriage settlement, which is presumed to have been intended by the parties to be governed by the law of the matrimonial domicile, in the absence of circumstances indicating a different intention (m). In the absence of express stipulation as to what particular law is to govern the contract in question, the English Courts will determine, from a consideration of the contract as a whole, what the intention of the parties in fact was, or what it may be presumed to have been (n). In some cases the use of particular phrases in the contract will indicate what the intention of the parties was. Thus the use in a charter-party of such phrases as the “ King’s enemies ” or “ the act of God ” goes far to show that the contract is to be considered as an English contract (o). So where an insurance was effected by a domiciled Englishman with an American company for the benefit of his wife and children “ in conformity with the statute,” the law of England was held applicable to the distribution of the policy moneys, in accordance with the presumed intention (p). But the insertion in a marriage settlement between a domiciled Englishman and a domiciled Scotswoman of an “ alimentary clause,” effectual against alienation by Scottish law but not by

(l) Cf. *Chamberlain v. Napier* (1880), 15 Ch. D. 614.

(m) *Re Fitzgerald, Surman v. Fitzgerald*, [1904] 1 Ch. 573, C. A., at p. 587.

(n) Cf. *Hamlyn v. Talisker Distillery*, [1894] A. C. 202; *South African Breweries v. King*, [1899] 2 Ch. 173; [1900] 1 Ch. 273, C. A.; *British South Africa Co. v. De Beers Consolidated Mines, Ltd.*, [1910] 1 Ch. 354; *Pena Copper Mines, Ltd. v. Rio Tinto Co., Ltd.* (1911), 105 L. T. 846, C. A.; *Howden & Co., Ltd. v. Powell Duffryn Steam Coal Co., Ltd.* (1912), 49 Sc. L. R. 605.

(o) *The Industrie*, [1894] P. 58; 63 L. J. P. 84, per Esher, M.R.; *Missouri Steamship Co.* (1889), 42 Ch. D. 321.

(p) *Crossland v. Wrigley* (1895), 73 L. T. Rep. (N.S.) 327. Cf. *Hamlyn v. Talisker Distillery*, [1894] A. C. 202, and *S. African Breweries v. King*, [1899] 2 Ch. 173.

English, has been held insufficient to entitle Scottish law to the preference (q).

The parties to a contract may of course agree with express reference to some particular foreign law (r); and in such cases the foreign law will only be admitted within the limits of that reference, and not generally—e.g. not as to foreign creditors (s). And accordingly, in *Greer v. Poole* (1880), 5 Q. B. D. 272, where an English policy provided for general average “as per judicial foreign statement,” it was held that the foreign law could not be invoked to decide what were and what were not “perils of the sea.” Substantially the same law had been laid down as long ago as 1820 in the case of *Lansdowne v. Lansdowne* (1820), 2 Bligh, 60, which came before the House of Lords on appeal from the Irish Court of Chancery, the point being whether the words “lawful money of Great Britain” in a marriage settlement executed in England by parties domiciled there meant lawful money at the rate of English or Irish currency, the “lawful money” issuing as a rent-charge out of land in Ireland. It was held, on the whole instrument, that the intention of the parties was that the money should be paid at the English rate of currency, notwithstanding the local situation of the land. “In the naked case of a charge upon lands,” said Lord Eldon, “the law is clear and settled; but upon wills and instruments of marriage contract all the cases cited authorise a distinction. In such cases the intention of the persons making the will (u) and of the parties to the contract, is to be collected from the different parts of the instrument. . . . In this case there are throughout the settlement charges on English as well as Irish estates. Can it be said, as to any of these charges, that a different sum is to be paid to the person entitled, according to the site of the estates out of which the money is drawn? In those instances where Irish estates only are charged, the situation and conduct of the parties, and the language of the instrument of contract, show that they meant English currency” (x). In *Kearney v. King* (1819), 2 B. & Ad. 301, it was held that a sum of money named in a promissory note meant a sum of money according to the currency of the place

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language.

(q) *In re Fitzgerald* (1903), 72 L. J. Ch. 430. It appears doubtful whether sufficient weight was given in this case to the intention of the parties. But if the “alimentary clause” was to be regarded as contrary to the policy of English law, the decision was no doubt correct.

(r) Cf. *Royal Exchange Assurance Co. v. Sjöforsakrings Aktiebolaget Vega*, [1902] 2 K. B. 384, C. A., at p. 394; *Kirchner v. Gruban* (1908), 127 L. T. Jo. 166.

(s) *Ex parte Dever, Re Suse* (1887), 18 Q. B. D. 660. So in *Spurrier v. La Cloche*, [1902] A. C. 446, when the English Arbitration Act was adopted by the contract.

(u) More recent decisions, however, have established the *lex domicilii* as the sole interpreter of a will. *Vide ante*, p. 310.

(x) *Vide Phipps v. Anglesea* (1721), 5 Vin. Ab. 209; 1 P. Wms. 696.

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where the note was made; but Story points out (§ 272) that in this case the place where the contract was made is also presumed to be the place of intended performance by payment, so that there is a double indication of the intention of the parties. The same point was assumed in *Sprowe v. Legg* (1822), 1 B. & C. 16, on the authority of the last-mentioned case. But the domicile of the husband, being also the *situs* of the subject-matter of the trust, has been preferred to the *locus celebrationis* in construing a marriage settlement, so far as that part of the trust property was concerned; the domicile of the wife being preferred as to other trust property dealt with by the same deed, and situate in the country of her domicile. The particular circumstances of the case are not so important as the fact that intention was applied as the sole test. "I infer and collect," said Hall, V.-C., "from the trusts of the contract, that there was an intention that there should be a difference between them: that one set should be construed as being English and the other as being Scotch" (y). The intention to regulate a marriage settlement by a particular law may of course be expressed in plain terms (z).

The question was mooted in *Dent v. Smith* (1869), 4 Q. B. 414, under the following circumstances. The plaintiffs had effected an insurance with the defendants on certain specie on board a vessel owned and registered in England at the time of the execution of the policy, for the voyage from London to Constantinople. Before the ship sailed she was sold to a Russian company, and the requisite formalities to effect a change of her nationality accordingly were duly complied with. She sailed under the Russian flag, and was stranded near Gallipoli before reaching her destination. The specie was saved, and was taken charge of by the nearest Russian consul until the rights of the owners of the ship and cargo should be adjusted according to Russian law, which prevailed within Turkish territory as to Russian subjects and Russian property by special treaty provisions with the Porte. The owners of the specie, in order to regain possession of it, were ultimately compelled to pay a much larger sum, under the name of salvage or general average, than would have been imposed upon them if the loss had been adjusted according to English law; and the question was whether this was a loss within the meaning of the words of the policy which the underwriters were compelled to make good. It was assumed in

(y) *Chamberlain v. Napier* (1880), 15 Ch. D. 614. Cf. *Bernard v. White* (1887), W. N. 8; and now see 45 & 46 Vict. c. 61, s. 72 (4) (Bills of Exchange Act, 1882).

(z) As in *Hernando v. Sawtell* (1884), 27 Ch. D. 284. *In re Bankes*, [1902] 2 Ch. 333, and *supra*, Part II., cap. vii. See also *In re Fitzgerald* (1903), 72 L. J. Ch. 430, cited *supra*, p. 419.

the course of the argument that English law, as the *lex loci celebrationis*, must govern the interpretation of the policy; and Cockburn, C.J., expressed his assent to the proposition that the English law must govern, though not expressly for the reason given. The decision was against the underwriters, apparently on the ground that, whether the policy was construed by English law or not, the loss was one fairly covered by its provisions; but with respect to the question of the alleged right of the English law to prevail as the *lex loci celebrationis*, it should be observed that the vessel was English when the policy was effected, and that, if her nationality had not been changed, the English law, instead of the Russian, would have regulated the rights of the parties in the event of the loss which happened; so that the opinion expressed by Cockburn, C.J., in favour of the English law as the law to govern the interpretation of the policy, may be referred as much to the undoubted intention of the parties as to the fact that the contract was made in England. And it has since been clearly held in *Greer v. Poole* (1880), 5 Q. B. D. 272, that, although it is competent to an underwriter on an English policy to stipulate that it shall be construed or applied in whole or in part according to a particular foreign law, yet, except when so stipulated, the English law is to prevail. In *King of Spain v. Machado* (1827), 4 Russ. 225, a much older case, it appears to have been assumed that any instrument executed abroad was to be construed according to the law of the country where it was executed. It is undeniable, therefore, that although in theory the place of execution is only one of the proofs which are admitted to show the intention of the parties, nevertheless, with regard to the interpretation and construction of their language, it is difficult to find any case in which the testimony furnished by it has not been held conclusive. In *Cood v. Cood* (1863), 33 Beav. 314, the law of the domicile of the contracting parties was called in by Lord Romilly to construe the language used; but in that case the English law, the law of the domicile, was also the law of the place where the letter containing the ambiguous language was despatched; nor were the reasons given for the preference of that particular law (which was also, of course, the *lex fori*) very clearly expressed. The subject-matter of the correspondence was the partition of the real and personal estate of a testator in Chili; and, though the question whether the letters amounted to a binding contract was decided in the manner just described, the decision was apparently arrived at after a general survey of the circumstances, including the fact that part of the property affected was land situate abroad.

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tion by
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There is a certain analogy, which is referred to by Story (§ 270), between the relation of the local law to a contract celebrated abroad, and that of the local custom to an agricultural or commercial contract entered into in some particular part of England; but it is only an analogy, and must not be pressed too far. Local custom in England may be regarded, within its territorial limits, as part of the Common Law by adoption, and the law, in following it, merely obeys itself; but there is an obvious distinction between this principle and that which requires English law to accept the interpretation and explication of a law wholly foreign to itself. The latter rule can only be defended on the ground that it is the English law that every man's lawful contract shall be interpreted by reference to his intention, and on the further ground that a man who contracts abroad intends that the interpretation of the foreign law shall be invoked. The rule is not, therefore, an absolute one, and will be excluded by proof that the intention did not in fact exist; while the rule that English contracts are to be construed with reference to every proved local custom is imperative, and the operation of the custom is only excluded by express stipulation to that effect, or by something in the contract wholly inconsistent with its admission (*a*). It should be observed, however, that customs affecting the land, as those relating to agricultural tenancy, are the only customs that can strictly be called local; and even these are not incorporated with the contract as essential to its interpretation because the *contract is made* in a particular locality, but because the subject-matter of the contract is there situate. A lease of English land made abroad would certainly be construed with reference to the agricultural customs of the country where the land was situated. It therefore appears hardly justifiable to cite the English law as to the effect of agricultural customs upon contracts as an authority for the proposition that the true interpretation of a contract must be according to the usage of the country where it was made. And the custom which is imported into many commercial contracts which have no relation to the soil, is not the custom of a particular locality as such, but the custom of a particular trade, market, profession, or association (*b*); in which case its operation is no doubt admitted wholly on the ground of the intention of the parties, but does not in any way show that the law of the place where a contract is made has of its own nature any claim to express that intention. The

(*a*) *Wigglesworth v. Dallison* (1779), Dougl. 201; *Hutton v. Warren* (1836), 1 M. & W. 474; *Myers v. Sarl* (1860), 3 E. & E. 306.

(*b*) *Hutchinson v. Tatham* (1873), 8 C. P. 482; *Sutton v. Tatham* (1839), 10 A. & E. 27; *Sweeting v. Pearce* (1860), 30 L. J. C. P. 109; *Humphrey v. Dale* (1857), E. B. & E. 1004.

correct view was clearly stated by Lord Kingsdown in *Kirchner v. Venus* (1859), 12 Moo. P. C. 361. "When evidence of the usage of a particular place is admitted, to add to or in any manner affect the construction of a written contract, it is admitted only on the ground that the parties who made the contract are both cognisant of the usage, and must be presumed to have made their agreement with reference to it. But no such presumption can arise when one of the parties is ignorant of it." The analogy, in fact, which exists between these cases, in which no conflict of law arises, and cases properly belonging to the domain of private international law, is useful only as establishing this general proposition, that all contracts are to be interpreted according to the intention of the contracting parties, and that any rules, whether of local or commercial custom or foreign law, will be admitted to aid in the interpretation, if it appears that they were in the mind and intention of the parties when the contract was made.

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(2) *Nature and Incidents of the Obligation of a Contract.*—The words by which the contract was entered into having been rightly interpreted and construed by the Court, or the facts out of which it arose having been duly proved, and it being established that the formalities of celebration required by the *lex loci* were duly complied with, the next subject for inquiry is the nature of the obligation imposed. What is the law which is to measure and define the rights and liabilities of the parties to the contract? It has been already seen that, with regard to the contract of marriage, Lord Campbell expressly (in *Brook v. Brook* (1861), 9 H. L. C. 193), assigned all the "essentials" of the contract to the *lex domicilii*, as the law of the place where the parties to the marriage contemplate performing the contract by residence. But it has been pointed out above (see p. 377) that there is an important distinction in this respect between the so-called contract of marriage and a contract in the strictly legal sense of the term. It is for the interest of every State, and therefore for the interest of States in general, that each should be left to determine for itself the exact nature of that which its domiciled subjects call marriage; and it is not in anything like the same degree the interest of every State to force its definition of the word upon those who, without residing in or being subject to it, temporarily invoke its assistance and authority to celebrate the contract, and constitute the relation. The *lex domicilii*, therefore, is rightly allowed to decide everything that relates to the marriage contract, except the forms of ceremonial; but with regard to other and ordinary contracts, the law of the place of performance has no title to a similar privilege. There are no analogous reasons of expediency and morality for permitting its

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supremacy in a contract, for example, of ordinary partnership; and the local law of a foreign country may rightly claim to say what shall be a sufficient cause to divorce the wife of one of its domiciled citizens, without thereby asserting its right to regulate the liabilities, *inter se*, of those merchants trading in it who entered into their contract of partnership in England. Accordingly, the general principle, to which we have seen that the contract of marriage is an exception, has met with almost universal acceptance; and it is clear that the *vinculum*, or legal tie, which results from a contract is dependent solely upon the law by which the parties intended that it should be constituted. And here the distinction indicated by Sir R. Phillimore in *The Patria* (1871), L. R. 3 A. & E. 462, may be usefully referred to. All contracting parties do expressly contemplate one thing, *i.e.*, the performance of the contract. But the obligation which is created between them does in many cases, and may in all, involve certain consequences which were not as a matter of fact within their contemplation. Accidents which were unforeseen, as well as events foreseen but misunderstood, frequently bring about a state of things which the parties did not think of providing for; and it becomes absolutely necessary, in order to ascertain their respective rights and liabilities, to inquire by what law the nature and incidents of the obligation are determined. In other words, to what law must the parties be assumed to have submitted themselves? what law must they be assumed to have had in their minds when they contracted? It is obvious that there may be a distinction between the considerations applicable to events not contemplated by the contract, and those applicable to events not only contemplated, but expressly provided for. It is proposed to treat of the first branch of the subject under the present heading, and to defer the latter until the proper place for considering the question of performance.

Law of
contract
referred to
intention of
parties.

With regard, then, to the nature of the obligation itself and to the incidents which arise in the course of its development, there must be some one law which the parties intended to be referred to, should necessity arise. This law is determined in different cases by different considerations, but the rule most generally adopted undoubtedly is, that the law of the place where a contract is made must govern the relation which arises out of it (*c*). This is not the rule, however, because of any inherent right or obligatory force in that law, but because that is the law to which the *intention* of the parties must *prima facie* be supposed to have looked. The local law, however, may, of course, be

(*c*) *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. 586, 599; *Ex parte Dever, Re Suse* (1887), 18 Q. B. D. 660; *Greer v. Poole* (1880), 5 Q. B. D. 272; *supra*, p. 419.

excluded by express or implied words (*d*), but no reference to a foreign law will be extended to an adoption of that law generally. On the contrary, apparently on the principle that *expressio unius est exclusio alterius*, such references are strictly construed. A policy of insurance by which the company agreed to pay to the wife for her sole use, in conformity with an American statute, was held not to incorporate the provisions of the same statute as to the rights of the husband's creditors (*e*). So, where a policy provided for a general average "as per judicial foreign statement," it was held that the foreign law could not be applied to determine what were perils of the sea (*f*). And it has already been pointed out that the use of particular phrases, such as "the King's enemies" or "the act of God," may be relied upon as indicating that the parties intended to contract according to English law (*g*). Where a contract was made in London, to be performed in Scotland, the fact that it contained an arbitration clause for reference to "two members of the London Corn Exchange or their umpire" was regarded as indicating an intention that the contract should be governed by English law (*h*). And where a contract of service was made to be carried out in the South African Republic "or elsewhere," both the contracting parties being English, the law of the South African Republic was preferred (on a question of restrictive covenant), as being that of the country with which the transaction had "most real connection" (*i*).

A contract of service, says Westlake, belongs, so far as the liability of the hirer is concerned, to the country where it is made, and in which the hirer lives, and not to that in which the service is to be performed. And so in *Re Anglo-Austrian Bank*, [1920] 1 Ch. 69, Younger, J., held that the contracts of service as bank managers of branches of German banks, made and executed in Berlin, were governed by German law. According to that law the contracts were not determined by the outbreak of war, but *quære*, whether they were cognisable in an English Court.

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(*d*) *Greer v. Poole* (1880), 5 Q. B. D. 272.

(*e*) See, for examples, *The Leon XIII.* (1883), 8 P. D. 121; *The Nina* (1867), L. R. 2 A. & E. 44 (the case of an agreement signed by a British mate of a Portuguese vessel to be bound by Portuguese law during the period of service); *The Mary Thomas*, [1894] P. 108, C. A. (the case of an English policy of insurance containing the stipulation "general average payable as per foreign statement").

(*f*) *Ex parte Dever, Re Suse* (1887), 18 Q. B. D. 660. Cf. also as to insurance policy, *American Surety Co. of New York v. Wrightson* (1910), 27 T. L. R. 91 (in which English law was applied to settle a dispute arising out of a Lloyd's policy issued on instructions from America).

(*g*) *The Industrie*, [1894] P. 58; 63 L. J. P. 84. *Re Missouri Steamship Co.* (1889), 42 Ch. D. 321, and cf. *Chartered M. Bank of India v. Netherlands India Steam Navigation Co.* (1883), 10 Q. B. D. 521.

(*h*) *Hamlyn v. Talisker Distillery*, [1894] A. C. 202.

(*i*) *S. African Breweries Co. v. King*, [1899] 2 Ch. 173; [1900] 1 Ch. 273.

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*Lex loci
celebrationis
prima facie
the governing
law.*

In the case of *Peninsular and Oriental Steam Co. v. Shand* (1865), 3 Moo. P. C. (N.S.) 272, where the contract was made in England for the carriage of a passenger with luggage from Southampton to the Mauritius, and it was contended that the liability of the carriers was governed by the French law in force there, it was said by Turner, L.J., in delivering the judgment of the Privy Council: "The general rule is that the law of the country where a contract is made governs as to the nature, the obligation, and the interpretation of it. The parties to a contract are either the subjects of the Power there ruling, or as temporary residents owe it a temporary allegiance; in either case equally they must be understood to submit to the law there prevailing, and to agree to its action upon their contract. . . . Their lordships are speaking of the general rule; there are, no doubt, exceptions and limitations on its applicability, but the present case is not affected by these." The nature of these exceptions and limitations is indicated more clearly in the judgment of the Exchequer Chamber in *Lloyd v. Guibert* (1865), 1 Q. B. 115: "It is generally agreed that the law of the place where the contract is made is *prima facie* that which the parties intended, or ought to be presumed to have adopted, as the footing upon which they dealt, and that such law ought to prevail in the absence of circumstances indicating a different intention. As, for instance, that the contract is to be performed elsewhere, or that the subject-matter is immovable property situate in another country, and so forth; which latter, though sometimes treated as distinct rules, appear more properly to be classed as exceptions to the more general ones, by reason of the circumstances indicating an intention to be bound by a law different from the place where the contract is made." It is, of course, unimportant whether these cases for the application of a different law are to be regarded as exceptions to the general rule in favour of the *lex loci contractus celebrationis*, or as applications of a distinct principle in favour of the law of the place of performance. Both rules are consequences of the one primary principle, that the intention of the parties is to be followed in all matters with which it has a right to deal. That this primary principle is more especially applicable to incidents of the obligation which were not contemplated or provided for by the parties, is well known by another passage from the same judgment: "In determining a question between contracting parties, recourse must first be had to the language of the contract itself; and (force, fraud, and mistake apart) the true construction of the language of the contract is the touchstone of legal right. It often happens, however, that disputes arise, not as to the terms of the contract, but as to their

application to unforeseen questions, which arise incidentally or accidentally in the course of performance, and which the contract does not answer in terms, yet which are within the sphere of the relation established thereby, and cannot be decided as between strangers. In such cases it is necessary to consider by what general law the parties intended that the transaction should be governed, or rather to what general law it is just to presume that they have submitted themselves in the matter. A familiar illustration of this will be found in the rule, that the lawful usages of a market are as much part of a contract entered into there, which does not expressly exclude them, as if they were set down at large. The binding force of such usages does not depend so much upon the knowledge of the parties *as upon implied acquiescence; for whoso goes to Rome must do as those at Rome do.* So, in the absence of express provision or special usage, the general law itself, in many points of view only a more extended usage, supplies the gaps which the parties have left, and in doing so sometimes modifies the construction of general words in the contract."

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The language of the Court of Appeal in *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. 589, is equally instructive: "There can be no hard-and-fast rule to construe the multiform commercial agreements with which we have to deal. . . . In such a case" (speaking of contracts to be performed partly in one place and partly in another) "the only certain guide is to be found in applying sound ideas of business, convenience and sense to the language of the contract itself, with a view of discovering from it the true intention of the parties. Even in respect of any performance that is to take place abroad, the parties may still have desired that their liabilities and obligations should be governed by English law" (k).

So far as unforeseen incidents of the obligation are concerned, the principle appears plain enough; and it is clear that the law will generally have to supply the defective intention of the parties by presuming some law to have been intended generally; but, accepting it as a general rule that contracts are governed, in the development of their incidents subsequent to the making, by the law of the place of celebration, it must be remembered that it is a rule peculiarly open to exceptions. The intention of the parties is the crucial test, and in contracts of affreightment, for example, it has been decided that *prima facie* the intention of the parties is to submit themselves to the law of the ship's flag, so far at least as sea damage and its incidents are concerned. But a contrary

Exceptions
to *lex loci*
celebrationis.

(k) Cf. *Bernard v. White* (1887), W. N. 8.

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affreight-
ment.

intention may be indicated; as, for example, by the use of phrases such as “the King’s enemies” or “the act of God” (l).

The principle above enunciated seems applicable to all unforeseen incidents of the obligation save those which arise out of the performance. *Lloyd v. Guibert* (m) was a case in which the contract of affreightment was a charter-party entered into at St. Thomas, a Danish West India island, between a British subject as charterer and the master, acting for the French ship-owners, of a vessel then at St. Thomas, for a voyage from St. Marc, in Hayti, to Havre, London, or Liverpool (ultimately the latter), at the charterer’s option. On the voyage to Liverpool the ship had to put into a Portuguese port for repair, and the captain there gave a bottomry bond upon the ship, freight, and cargo. On the ship’s arrival at Liverpool, the holder of the bond sued upon it in the Court of Admiralty. The ship and freight were insufficient to satisfy the bond; and the deficiency with costs fell on the plaintiff as owner of the cargo, for which he sought indemnity against the defendants, the French ship-owners. By the law of France abandonment of the ship and freight absolved the defendants from all further liability on the contract of the master, and they had in fact so abandoned the ship and freight to the plaintiff as owner of the cargo. By the English law they would have been liable to indemnify the plaintiff, notwithstanding the fact of such abandonment. It was contended for the plaintiff that the decision ought to proceed either (i.) upon what was called the “general maritime law,” as regulating all maritime transactions between persons of different nationalities at sea; (ii.) upon the Danish law, as the *lex loci celebrationis*, the law of the place where the contract was made; (iii.) upon the Portuguese law, as the law of the place where the bottomry bond was given (though it is difficult to see how this could have been called in to regulate the rights of the parties on a contract made before the ship came into a Portuguese port, and without any expectation of her doing so); or (iv.) the English law, as being that of the place of final performance by the delivery of the cargo, the *lex loci solutionis*. By all these laws the liability of the defendants was established. The French law alone was relied on on behalf of the defendants; and it was contended that this law must be applied either because the character of the transaction itself showed that the plaintiff impliedly submitted his goods to the operation of the law of the ship, and therefore contracted with reference to it; or else upon

(l) *The Industrie*, [1894] P. 58; 63 L. J. P. 84. Cf. *Re Missouri Steamship Co.* (1889), 42 Ch. D. 321. *Chartered Merc. Bank of India v. N. I. Steam Nav. Co.* (1883), 10 Q. B. D. 521.

(m) (1865), L. R. 1 Q. B. 115. Cf. also *The August*, [1891] P. 328.

the ground that the master, who entered into the contract (although in doing so he acted within the scope of his authority from the owners), was disabled by the French law from binding his owners, otherwise than with the exception, expressed or implied, of exemption from liability after abandonment, and that the French flag was sufficient notice of such disability. It was held that the parties must, under the circumstances, be taken to have contracted with reference to the law of France, and not to that of the place where the contract was made (the Danish), or to the law of England as the place of performance. The general rule was laid down by Willes, J., that where the contract of affreightment does not provide otherwise, then as between the parties to such contract, in respect of sea damage and its incidents, the law of the ship must govern; and it was said that this rule was not only in accordance with the probable intention of the parties, but also most consistent, intelligible, and convenient to those engaged in commerce. The judgment of the Exchequer Chamber, delivered by Willes, J., after laying down the general rule that the question is in such cases by what law the parties intended that the transaction should be governed, or rather to what law it is just to presume that they submitted themselves, proceeded as follows :—

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“In the diversity or conflict of laws, which ought to prevail is a question that has called forth an amazing amount of ingenuity and many differences of opinion. It is, however, generally agreed that the law of the place where the contract is made is *prima facie* that which the parties intended, or ought to be presumed to have adopted, as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as, for instance, that the contract is to be entirely performed elsewhere, or that the subject-matter is immovable property situate in another country, and so forth; which latter, though sometimes treated as distinct rules, appear more properly to be classed as exceptions to the more general one, by reason of the circumstances indicating an intention to be bound by a law different from that of the place where the contract is made, which intention is inferred from the subject-matter and from the surrounding circumstances, so far as they are relevant to construe and determine the character of the contract.

Judgment in
Lloyd v.
Guibert.

“The present question does not appear to have ever been decided in this country, and in America it has received opposite decisions equally entitled to respect (*n*). We must therefore deal with it as a new question, and endeavour to be guided in its

(*n*) *Arayo v. Currell* (1831), 1 Louis. Rep. 528; *Pope v. Nickerson* (1844), 3 Story, Rep. 465.

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solution by a steady application of the general principle already stated, viz. that the rights of the parties to a contract are to be judged of by that law by which they intended, or rather by which they may justly be presumed, to have bound themselves.

“We must apply this test successively to the various laws which have been suggested as applicable; and first to the alleged general maritime law.

“We can understand this term in the sense of the general maritime law, as administered in the English Courts, that being in truth nothing more than English law, though dealt out in somewhat different measures in the Common Law and Chancery Courts and in the peculiar jurisdiction of the Admiralty; but as to any other general maritime law by which we ought to adjudicate upon the rights of a subject of a country which by the hypothesis does not recognise its alleged rule, we were not informed what may be its authority, its limits, or its sanction. Passing over the common ground of ethics and the elementary ideas of natural law (*jus gentium*), such as the rights of prior occupancy and self-preservation, the privileges and exemption of necessity, the common duties of humanity, of more or less perfect obligation, the idea of property, including the obligation of contracts, and those obligations for the most part conventional upon which is based the modern system of international law (*jus inter gentes*); inasmuch as these supply no precise rule for the matter in hand—it would be difficult to maintain that there is, as to such questions as the present, depending in a great measure upon national policy and economy, any general law in the sense of universal law, binding at sea, any more than upon land, nations which either have not assented or have withdrawn their assent thereto.

“Moreover, we are not satisfied that there is any such general concurrence of mankind, that shipowners should be absolutely answerable personally for the acts of the master. Pothier (*Sur la Charte-partie*, part 1, No. 34) was cited in the affirmative, and Emerigon (*Contrat à la grosse*, c. 4, s. 11) upon the negative rule. Pothier, founding his interpretation upon the civil law *de exercitoria actione* (see Valin, *Sur l'Ordonnance*, liv. 2, tit. 8, art. 2), thought that the clause of the celebrated *Ordonnance de la Marine* of 1681 (liv. 2, tit. 8, art. 2), from which art. 216 of the *Code de Commerce* was taken, applied only to illicit acts of the master, and that upon his contracts the owner was liable and could not get rid of liability by abandonment. Emerigon, on the other hand, founding his opinion upon the general rule of maritime law as he understood it, thought that from liability for all acts of the master, whether licit or illicit, including con-

tracts, the owner could free himself by abandonment. The jurisprudence of the Court of Cassation leant towards the opinion of Pothier, and that led in 1841 to the modification of art. 216 to its present shape, by which, according to the statement of the learned annotator in *Sirey's Code de Commerce annoté*, by Gilbert, note 18 upon art. 216, the opinion of Emerigon is now established in France. To this may be added that similar, though not identical, provisions for the protection of the owner are to be found in other Codes—for instance, that of Spain (*Código de Comercio*, arts. 621, 622) and Prussia (*Allgemeines Deutsches Handels-gesetzbuch*, arts. 451, 452, 453, and the following).

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“This is sufficient to show that there is no general uniform rule in maritime law upon the subject; indeed, looking at home, there seems little, if any, difference in principle between the French law under consideration and our own statutory provisions for limited liability in respect of obligations by reason of collision, which latter have now by express enactment been extended to collision between British and foreign vessels (25 & 26 Vict. c. 63, s. 54; *The Amalia* (1863), 1 Moo. P. C. (N.S.) 471).

“In truth, any general, much more any universal, maritime law, binding upon all nations using the highway of the sea in time of peace, except when limited as administered in some court, is easier longed for than found. Accordingly, we observe that both the very learned judge of the Court of Admiralty and the Judicial Committee of the Privy Council, in deciding, in the case of *The Hamburg, Duranty v. Hart* (1864), 2 Moo. P. C. (N.S.) 289, that the validity of a bottomry bond given in a foreign port was to be determined by the general maritime law, and not by the law of the ship or the port where the bond was given, added to the expression, ‘the general maritime law,’ this qualification, viz. ‘as administered in England.’ That case was cited as an authority, and at first sight it appeared to be one for applying English law to the present case, but upon consideration it appears altogether distinguishable. The alleged agency of the master in that case was founded upon necessity alone, and it was incumbent upon the bondholder to establish such necessity by evidence; and in order to do that he was bound (according to the rule prevailing since the case of *The Bonaparte*) (1853), 8 Moo. P. C. 459, to show a communication with the owner of the cargo, that being, as the Court held, reasonably practicable. So that the *lex fori* was undoubtedly supreme upon the question which then arose, it being one of evidence and procedure. Had the decision been intended to go

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further, the Judicial Committee of the Privy Council would probably have considered and compared the case of *Cammell v. Sewell* (1858), 5 H. & N. 728, and pointed out the distinction in this respect between a hypothecation in case of necessity, and a sale in case of necessity, which, according to the decision of the majority of the Court in *Cammell v. Sewell*, against the opinion of Byles, J., depends for its validity upon the law of the place where the sale was made, and not the general maritime law as administered in England; upon which, however, we offer no opinion.

“In one other point of view the general maritime law as administered in England or (to avoid periphrasis) the law of England, viz. as the law of the contemplated place of final performance or port of discharge, remains to be considered. It is manifest, however, that what was to be done at Liverpool (besides that it might at the charterer’s option have been done at Havre) was but a small portion of the entire service to be rendered, and that the character of the contract cannot be determined thereby. It is true that, as to the mode of delivery the usages of Liverpool would govern, as those of Algiers did in *Robertson v. Jackson* (1845), 2 C. B. 412, and as in the mode of taking on board the cargo the usage of the port of loading would be regarded (see *Hudson v. Clementson* (1856), 18 C. B. 213, and the custom set out in the pleadings in *Gattorno v. Adams* (1862), 12 C. B. (N.S.) 560, which custom was proved at the trial at Guildhall sittings after Michaelmas term, 1862, and made an end of the case). And in this point of view it seems impossible to exclude the law of England or even that of Hayti, from relevancy in respect of the manner of performing that portion of the service contracted for which was to be rendered in their respective territories; because the ship must needs, for the time being, conform to the usages of the port where she is, and for a like reason the adjustment of a general average at the port of discharge, according to the law prevailing there, is binding upon the shipowner and the merchant, who must be taken to have assented to adjustment being made at the usual and proper place, and, as a consequence, according to the law of that place: *Simonds v. White* (1824), 4 B. & S. 805.

“It is unnecessary, however, to discuss this point further, because we have been anticipated and the question set at rest in an instructive judgment of the Judicial Committee, delivered by the Lord Justice Turner, since the argument of the present case, in that of *Peninsular and Oriental Company v. Shand* (1865), 3 Moo. P. C. (N.S.) 272, where a passenger in an English vessel from

Southampton to Mauritius, where French law prevails, sued the shipowners for the loss of his luggage upon an alleged liability by the French law, from which liability the shipowner was exempt by the English law; and the passenger obtained judgment in his favour in the Mauritius court, which judgment was reversed upon appeal by the Judicial Committee, their lordships holding that the law of England governed the case.

“Next, as to the law of Portugal: the only semblance of authority for resorting to that law, as being the law of the place where the bottomry bond was given, is the case already referred to of *Cammell v. Sewell*, and we consider that the judgment in that case, if applicable at all, as to which we say nothing, could only affect the validity of the bottomry, and not the duties imposed upon the shipowner towards the merchant by the fact of the bottomry, which duties must be traced to the contract of affreightment and the bailment founded thereupon.

“The law of Hayti was not mentioned nor relied upon in argument, and there remain only to be considered the laws of Denmark and of France, between which we must choose.

“In favour of the law of Denmark there is the cardinal fact that the contract was made within Danish territory, and further that the first act done towards performance was weighing anchor in a Danish port.

“For the law of France, on the other hand, many practical considerations may be suggested; and, first, the subject-matter of the contract, the employment of a sea-going vessel for a service the greater and more onerous part of which was to be rendered upon the high seas, where, for all purposes of jurisdiction, criminal or civil, with respect to all persons, things, and transactions on board, she was as it were a floating island, over which France had an absolute and, for all purposes of peace, as exclusive a sovereignty as over her dominions by land; and which, even whilst in a foreign port, according to notions of jurisdiction adopted by this country (18 & 19 Vict. c. 91, s. 21; 24 & 25 Vict. c. 94, s. 9) and carried to a greater length abroad (*Ortolan, Diplomatie de la Mer*, c. xiii., the work of a French naval officer, but of which a jurist might well be proud), was never completely removed from French jurisdiction.

“Further, it must be remembered that, although bills of lading are ordinarily given at the port of loading, charter-parties are often made elsewhere, and it seems strange and unlikely to have been within the contemplation of the parties, that their rights or liabilities in respect of the identical voyage should vary, first, according as the vessel was taken up at the port of loading or not; and, secondly, if she were taken up elsewhere, according

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to the law of the place where the charter-party was made or even verified. If a Frenchman had chartered the *Olivier* upon the same terms as the plaintiff did, it would seem strange if he could appeal to Danish law against his own countrymen, because of the charter-party being made or ratified in a Danish port, though for a service to be rendered elsewhere, by a transient visitor, for the most part within French jurisdiction.

“Moreover, there are many ports which have few or no sea-going vessels of their own, and no fixed maritime jurisprudence, and which yet supply valuable cargoes to the ships of other countries. Take Alexandria, for instance, with her mixed population, and her maritime commerce almost in the hands of strangers. Is every vessel that leaves Alexandria with grain under a charter-party or bill of lading made there, and every passenger vessel leaving Alexandria or Suez, be she English, Austrian, or French, subject to Egyptian law? As to not a few half-savage places in Africa and Asia, with neither seagoing ships nor maritime laws, a similar question arises—what is the law in such cases, or is there none, except that of the Court within whose jurisdiction the litigation first arises?

“Again, it may be asked, does a ship which visits many ports in one voyage, whilst she undoubtedly retains the criminal law of her own country, put on a new sort of civil liability at each new country she visits in respect of cargo there taken on board? An English steamer, for instance, starts from Southampton for Gibraltar, calling at Vigo, Lisbon, and Cadiz. A Portugese going in her from Southampton to Vigo would naturally expect to sail subject in all respects to English law, that being the law of the place and the ship. But if the locality of the contract is to govern throughout, an Englishman going from Vigo to Lisbon on the same voyage would be under English law as to crimes and all obligations not connected with the contract of carriage, but under Spanish law as to the contract of carriage; and a Spaniard, going from Lisbon to Cadiz during the same voyage, would enjoy Portuguese law as to his carriage, and be subject to English law in other respects. The cases which we have thus put are not extreme nor exceptional; on the contrary, they are such as would ordinarily give rise to the question, which law is to prevail? The inconvenience and even absurdities which would follow from adopting the law of the place of contract in preference to that of the vessel, are strong to prove that the latter ought to be resorted to.

“No inconvenience comparable to that which would attend an opposite decision has been suggested. The ignorance of French law on the part of the charterer is no more than many

Englishmen contracting in England with respect to English matters might plead as to their own law, in case of an unforeseen accident.

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“Nor can we allow any weight to the argument that this is an impolitic law, as tending to interfere with commerce, especially in making merchants cautious how they engage foreign vessels. That is a matter for the consideration of foreigners themselves, and nothing short of a violation of natural justice, or of our own laws, could justify us in holding a foreign law void because of being impolitic. No doubt the French law was intended to encourage shipping by limiting the liability of shipowners, and in this respect it goes somewhat further than our own; but whether wisely or not is matter within the competence and for the consideration of the French Legislature, and upon which, sitting here, we ought to pronounce no opinion.

“Exceptional cases, should they arise, must be dealt with upon their own merits. In laying down a rule of law, regard ought rather to be had to the majority of cases upon which doubt and litigation are more likely to arise; and the general rule that, where the contract of affreightment does not provide otherwise, there, as between the parties to such contract in respect of sea damage and its incidents, the law of the ship should govern, seems to be not only in accordance with the probable intention of the parties, but also most consistent and intelligible, and therefore most convenient to those engaged in commerce.

“In order to preclude all misapprehension, it may be well to add that a party who relies upon a right or an exemption by foreign law is bound to bring such a law properly before the Court, and to establish it in proof. Otherwise the Court, not being entitled to notice such law without judicial proof, must proceed according to the law of England (see *Brown v. Gracey*, note to *Lacon v. Higgins*)” (c).

The principle on which the judgment in *Lloyd v. Guibert* was given, that contracts of affreightment entered into in a foreign port are made with reference to the law of the ship's flag, so far as the nature and incidents of the obligation are concerned, has been criticised on the ground that the obligation as between the charterer and the shipowner ought to be measured by the law of the place where the charter-party is entered into, or, if by any other law, by the law of the port of delivery, as the place of performance. But it has already been shown (p. 424) that the law governing a contract is not necessarily limited to the law of the place of celebration or the law of the place of performance. The true rule is, that the obligation of a contract must be

Contracts of
affreight-
ment
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the law of the
ship's flag;
or by the
intention of
the parties.

(c) (1822), D. & R. N. P. 41, n. See *infra*, Chap. X. (v.).

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measured by the law to which the parties intended to refer, or must be assumed to have submitted themselves. And this law, though it may be, and most generally is, the law of the place where the contract is entered into, is not so necessarily, or by any *præsumptio juris* or *juris et de jure* which would be incontrovertible. *Prima facie* it is that law, but evidence is admissible to show that it is any other. In the words of Willes, J., which have already been cited, "It is generally agreed that the law of the place where the contract is made is *prima facie* that which the parties intended, or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention." Now, the essence of the decision in *Lloyd v. Guibert* is that, in every contract of affreightment, there are such circumstances (p). Contracts of affreightment may be made in half-savage or barbarous ports, or even, to take a more familiar instance, in such places as Alexandria, where it would be absurd to hold that the parties intended their mutual rights to be regulated by the local maritime law of the place of affreightment. It might possibly be convenient to refer in all cases to the law of the port of delivery, as the place of performance, but the fatal objection at once arises that this is a detail which is frequently left uncertain, to be determined either upon signing bills of lading, or upon calling at some named port for orders; as, for example, in *Lloyd v. Guibert* itself, where the vessel was chartered to carry either to Havre, London, or Liverpool, at the charterer's option. The choice of the law of the flag of the vessel—i.e. the law of her owner—appears therefore, as was said in that case, "not only in accordance with the probable intention of the parties, but also most consistent and intelligible, and therefore most convenient to those engaged in commerce" (q).

Nor is the case of a contract of affreightment the only one in which the law of the *locus actus* or *celebrationis* is presumed to have been left out of the intention of the parties. Another instance is that of a bottomry bond, given in a foreign port, and sued on in England. The obligation so created, as well as the incidents of the relation arising out of it, is now referred to the law of the flag (r), but was formerly held to be governed by the

Bottomry
bonds.

(p) *The Patria* (1871), 3 A. & E. 436, was decided by the express stipulations of the contract, and cannot be regarded as an authority for any one-competing law.

(q) (1865), L. R. 1 Q. B. 115, at p. 129. In the case of *Re Missouri Steamship Co.* (1889), 42 Ch. D. 321, the law of the flag was followed, not because it was the law of the flag, but because of the evident intention of the parties. In *The Industrie*, [1894] P. 58, the intention of the parties was taken to have excluded the law of the flag.

(r) *The Gaetano and Maria* (1882), 7 P. D. 1, 137, C. A.

“general maritime law, as administered in England,” and this whether the vessel on which the bottomry bond is given was English or foreign (s). It cannot be said that this position was altogether free from some uncertainty and difficulty. The language employed in *The Hamburg*, *Duranty v. Hart*, both by the judge of the Admiralty Court and by the Privy Council, is in itself free from ambiguity, except so far as it is doubtful whether the expression “general maritime law, as administered in England,” means English law *simpliciter* or not. But in *Lloyd v. Guibert*, on appeal before the Exchequer Chamber, the case was fully discussed, and is there said to be no authority for the law of the place where the contract was made, or for that of the place of performance, but merely an instance of the supremacy of the *lex fori* in matters of procedure and evidence. This conclusion is arrived at by considering that the validity of the bond in that case depended upon the agency of the master, and that the agency of the master, by English law, depended upon the *necessity* of his act; and that therefore the question was one of evidence, inasmuch as the English law did not consider the agency shown unless it was shown that the master acted of necessity without communicating with his owner. It is difficult to assent to the view that this is a question of evidence or procedure. All the facts were admissible, and all were proved; the question was simply as to the validity of the bond. To say that the Court will not recognise its validity, unless some other fact is proved, seems very like demanding to test that validity by its own law, and not by that of the place where the contract was made, or (in *The Hamburg*) (t) by the law of the country to which the ship belonged.

It can scarcely be denied, therefore, that the judges of the Privy Council, as well as the judge of the Admiralty Court, considered themselves, in *The Hamburg*, to be following an established principle that the validity of a bottomry bond was to be decided by the general maritime law, as administered in England. Whether this be the correct effect of the case, or whether they were in truth deciding a question of evidence and procedure alone, according to the opinion expressed of their judgment in *Lloyd v. Guibert*, is of little consequence. The simplest and most intelligible view is (u) that the law actually followed did not govern the case, and that the case must be

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(s) *The Karnak* (1869), 2 P. C. 505; *The Hamburg, Duranty v. Hart* (1864), 2 Moo. P. C. (N.S.) 289; *The Gratitude* (1801), 3 C. Rob. 240. As to the meaning of the expression “the general maritime law as administered in England,” see *The Gaetano and Maria* (1882), 7 P. D. 137; *Lloyd v. Guibert*, *supra*; and *The Segredo* (otherwise *Eliza Cornish*) (1853), 1 L. R. E. & A. 45.

(t) *Supra*, S. C. *sub nom. The Hamburg* (1864), B. & L. 253.

(u) MacLachlan, *Law of Merchant Shipping* (1911), pp. 181, 182.

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regarded as over-ruled by *Lloyd v. Guibert*. And this was undoubtedly the ground of the later decision in *The Karnak* (1869), 2 P. C. 505, where the Privy Council applied the doctrine of *Lloyd v. Guibert* to the very question at issue in *The Hamburg*, holding that the validity of a bottomry bond, depending upon the action of the master in the foreign port where it was given, must be tested and ascertained, not by the “general maritime law, as administered in England,” but by the law of the flag. “It was laid down in *Lloyd v. Guibert*,” said Sir William Erle (x), “that the captain’s authority is derived from, and bounded by, the municipal law of the country to which the ship belongs—that is, by the law of the flag; and Willes, J., delivering the judgment of the Exchequer Chamber, answers an argument, founded on the supposition of a general maritime law, contradistinguished from the municipal law of this country, by refusing to recognise the existence of a maritime law in that sense. In accordance with the principle there laid down, their lordships consider that the existence of the necessity which validates the hypothecation of cargo by bottomry is to be ascertained by evidence in the usual manner; and that the meaning of the term ‘necessity’ in respect of hypothecation by the master is analogous to its meaning in other parts of the law.”

Authority of
master
limited by
law of flag.

A later decision in the Court of Appeal on the subject seems to be entirely in accordance with this principle. In *The Gaetano and Maria* (1882), 7 P. D. 137, it was held that the authority of the master to execute a bottomry bond depended upon the law of the flag, and not upon “general maritime law,” which had been preferred in the court below. The language of Brett, L.J., in this case shows the distinction between “general maritime law” and “general maritime law, as administered in England.” The latter is, in substance, English maritime law. Apart from the exceptional case of the master of a ship, the ordinary rule as to the authority of an agent would seem to refer its nature and extent to the authority of the place where he is found acting (y).

The principle of *Lloyd v. Guibert*, that the master’s authority is defined and limited by the law of his flag, is therefore now to be regarded as applying to all contracts made by him, and as extending as well to contracts of hypothecation by means of bottomry bonds as to contracts of affreightment. In the words of Willes, J., in *Lloyd v. Guibert*, “So far as regards the implied authority of the master of a ship to bind his owners personally, the flag of the ship is notice to all the world that the master’s

(x) (1869), L. R. 2 P. C. 505, at p. 512. See the judgment of Willes, J., cited *supra*, pp. 429 *seq.*

(y) *Maspons y Hermano v. Mildred* (1882), 9 Q. B. D. 530, 539.

authority is conferred by the law of that flag; and that his mandate is contained in the law of that country with which those who deal with him must make themselves acquainted at their peril." An examination of the judgment of the Exchequer Chamber in this case (*supra*) will show that the operation of the law of the flag is not confined to the question whether the master had or had not authority to contract at all. It is intended to do more than this; and its right is now asserted to regulate the liabilities and regulations which arise amongst the parties to the agreement, be it of affreightment or hypothecation, upon this principle—that the shipowner who sends his vessel into a foreign port gives notice by his flag to all who enter into contracts there with the shipmaster, that he intends the law of that flag to regulate those contracts, and that they must either submit to its operation, or not contract with him or his agent at all (z). Thus the law of the flag has been applied to determine the right of shippers of goods against the master for selling damaged cargo (a). To this large extent it must therefore be regarded as an exception to the *prima facie* rule that the nature and incidents of an obligation depend upon the place where the contract is entered into.

The comments made (b) upon the distinction between the law of the ship's flag and the law of the domicile of the owner are, perhaps, superfluous. It is true that one or two expressions are used by Story in *Pope v. Nickerson* (1844), 3 Story Rep. 465, to which reference has already been made, tending to confuse the law of the ship's flag with the law of the owner's domicile; but it must be remembered that in that case the two were identical, and that Story did not mean to pronounce for the law of the domicile as against the law of the flag is evident from several expressions in the judgment. "If," he said, "the ship is *owned and navigated* under the flag of a foreign country, the authority of the master to contract for, and bind, the owners, must be measured by the laws of that country. . . . The extent of the master's authority must be limited to the express instructions of the owners or the law of the country *where the ship belongs and they reside*. . . . If by the *law of the domicile of the ship and of the owners* the authority of the master is limited to the ship and freight, and does not, in the absence of express instructions, bind the owners personally, it seems difficult to understand how resort can be had to the law of a foreign country, unknown and

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Law of the
flag and law
of owner's
domicil in
conflict.

(z) *The Karnak* (1869), 2 P. C. 505; *Lloyd v. Guibert* (1865), *supra*; *The Osmanli* (1849), 3 W. Rob. 198; *The North Star* (1860), 29 L. J. Ad. 73. In the last two cases, however, the facts under consideration were such that the law of the flag was English—i.e. identical with the "general maritime law, as administered in England," advocated by the older decisions.

(a) *The August*, [1891] P. 328.

(b) Cf. Maclachlan, *op. cit.* p. 181.

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unsuspected (it may be) by the owners, to expand that authority.” In *Lloyd v. Guibert* there is certainly not even as much leaning as this towards the law of the owner’s domicile, which is ignored altogether, although it was there also the law of the ship’s flag. The fact that any British subject, wherever domiciled, may sail his ship under the British flag, and have her registered accordingly, as well as the further consideration that most British ships are divided amongst a plurality of owners, are illustrations of the impossibility of accepting the decision of the law of the owner’s domicile in place of that of the ship’s flag; and in face of the modern decisions it is most improbable that such a misapprehension will ever find an advocate for the future.

Bills of
lading.

In *Blanchet v. Powell’s Llantivit Collieries Co.* (1874), 9 Ex. 74, the plaintiff sued for freight on a bill of lading made in France, and in answer to a plea that he did not carry all the goods mentioned in the bill of lading, pleaded (*inter alia*) that, according to the law of France, the whole freight was payable, although part only of the goods were carried and delivered. The replication was held good, Bramwell, B., saying that as the contract was made in France, the rights and obligations of the parties must be governed by French law. In this case it was suggested in argument that the law of France could not apply to a contract which was to be performed in England; but except so far as the mode and incidents of the delivery, as part of the performance, are concerned, it is clear that no authority is to be found for applying the *lex loci solutionis* without a special stipulation to that effect. It was not necessary to decide that the contract of affreightment was governed by French law, inasmuch as the plaintiff was held to be entitled to the lump freight by the law of England also. The reason, however, given for accepting the French law, viz., that the contract was made in France, does not seem to be consistent with the doctrine of *Lloyd v. Guibert*, which lays down that the law of the ship should govern as between the parties to a contract of affreightment, in respect of sea damage and its incidents. It is difficult to see why this rule should not equally be applied to the whole obligation of the contract, except so far as the law of the place of performance may properly claim to be heard; but the rule itself was not brought to the notice of the Court in *Blanchet v. Powell’s Llantivit Collieries Co.*, nor did the nationality of the ship in fact appear to be other than French. The *dictum* is therefore of little importance, except as showing the general tendency to assume that the law of the place of contract is *prima facie* that intended to govern its obligations and incidents.

A bill of lading is the receipt given on behalf of the carrier

by sea to the shipper for the goods shipped on a specified ship or received for shipment generally. It constitutes a document of title, which may be dealt with by the shipper, his assignee or any subsequent indorsee by indorsement and delivery of the bill. It also contains the terms of the contract of carriage between the carrier and the holder of the bill. It is a contract by the carrier to deliver the goods therein described at the prescribed destination to the legal holder of the bill, in the condition in which they were shipped unless prevented by circumstances expressly stated therein or implied by law. After the decision by Lord Mansfield in *Forward v. Pittard* (1785), 1 T. R. 27, that a shipowner was liable for damage to the cargo arising from perils of the sea and without negligence, shipowners introduced into bills of lading a steadily increasing list of exceptions limiting their liability (c). The English Courts endeavoured to meet this evasion of liability by giving the narrower rather than the wider interpretation to these exceptions, while the Courts in the United States took the holder line by declaring that clauses exempting the shipowner from liability for negligence, in relation to the seaworthiness of the ship or the care of the cargo were contrary to public policy, and of no legal effect. Partly to remove doubt and partly to secure uniformity in bills of lading issued in the United States the Harter Act, 1893, was passed, which was followed by legislation on similar lines by Australia in 1904, Fiji in 1906, New Zealand in 1908, 1911 and 1912, and Canada in 1910 and 1911. Art. 592 of the Commercial Code of Japan provided that "Even by express agreement a shipowner cannot exempt himself from his liability for damage caused by his fault or by the serious fault of a seaman or of any other person employed or by the unseaworthiness of the ship." But although based on a common principle these statutes suffered disadvantages inasmuch as they were necessarily local in their application and differed from each other in some detail or other. Instead of securing uniformity they added to complexity. In their Report of February, 1921, the Imperial Shipping Committee recommended uniform legislation throughout the Empire prohibiting shipowners from contracting out of carriers' risks as distinguished from navigation risks in bills of lading. This question was then taken up by the Maritime Law Committee of the International Law Association and at the Hague Conference of the Association in August, 1921, a code of Rules entitled "The Hague Rules, 1921," was approved and recommended for international adoption.

Shortly, the effect of these Rules was to hold the shipowner

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Liability of
Carrier by
Sea.

(c) See *Nugent v. Smith* (1875), 1 C. P. D. 19, 423.

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responsible for the goods from the time they were loaded till they were unloaded, and to free him from liability for loss or damage resulting from unseaworthiness if he were shown to have exercised due diligence to provide a seaworthy ship, properly manned, equipped and supplied and to free him from navigation risks. They were widely adopted and proved eminently successful in operation (*d*). On 26th October, 1922, the Rules were substantially adopted by the Official Diplomatic Conference at Brussels under the title of the “Basis of an International Convention for the unification of certain Rules relating to Bills of Lading.” In compliance with their promise to the Imperial Shipping Committee, the British Government in March, 1923, introduced a Bill embodying the Rules. In consequence of opposition from some interested parties a Joint Committee of both Houses of Parliament was set up which reported in July, 1923, in favour of the Rules as they stood subject to certain provisions meeting the requirements of the coasting trade and the trade in bulk cargoes. Eventually on 1st August, 1924, the Carriage of Goods by Sea Act, 14 & 15 Geo. 5, c. 221, was passed, whereby the Rules as amended relating to bills of lading contained in the Schedule to the Act are given the force of law applying to the carriage of goods by sea in ships or carrying goods from any port in Great Britain or Northern Ireland to any port whether in or outside Great Britain or Northern Ireland. Thus the Rules, so far as bills of lading issued in this country are concerned, compulsorily form part of every contract evidenced by a bill of lading. To this extent freedom of contract has been limited, but certain contracts may be made in any terms upon which the parties may agree. By Art. VI. such agreements shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such provided that no bill of lading has been issued. Any such agreement shall have full legal effect. That is to say, shipping documents if containing special conditions limiting the carrier’s liability shall not be in the form of bills of lading at all.

It is expressly provided that Art. VI. “shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments when the character or condition of the property to be carried, or the circumstances, terms and conditions under which the carriage is to be performed are such as to reasonably justify a special agreement.” Since, however, the bulk of the coasting trade is carried on without bills of lading, s. 4 of the Act completely exempts this trade from the operation of the Act by providing that Art. VI. shall “have

(*d*) See Report of Joint Committee on the Carriage of Goods by Sea Bill, 1923, pp. 32, 44.

effect as though the said Article referred to goods of any class instead of to particular goods and as though the proviso to the second paragraph of the said Article were omitted."

Although no specific reference is made in the Act to "Received for Shipment" bills of lading, the words "any document of title" in Art. III. (7) are intended to cover such documents. This Article provides that after the goods are loaded the bill of lading to be issued by the carrier to the shipper shall on demand by the carrier be a "shipped bill of lading" provided that if the shipper shall have previously taken up any document of title he shall surrender it for a "shipped" bill of lading. The carrier, however, may note on such document the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment and the document when so noted is then deemed to constitute a "shipped" bill of lading.

Unfortunately the Courts have differed upon the question whether a "received for shipment" is a bill of lading or not. Lord Phillimore in delivering the opinion of the Judicial Committee in *The Marlborough Hill*, [1921] 1 A. C. 444, indicated that a "received for shipment" is a bill of lading for all purposes. And in *Weis v. Produce Brokers' Co.*, [1921] 7 Lloyd's List Law Rep. 211, and in *United Baltic Corporation v. Burgett*, [1921] 8 *Ib.* 190, the Court of Appeal held that the bill of lading usual in the trade—"shipped or delivered for shipment" was in compliance with a c.i.f. contract. A few days later in *Diamond Alkali Export Corporation v. Bourgeois*, [1921] 3 K. B. 443, McCardie, J., held that a "received for shipment" bill of lading was not a fulfilment of the seller's obligation under a c.i.f. contract in the particular case before him (e).

It may be noted that in *Mowbray and Robinson v. Rosser*, [1922] 91 L. J. K. B. 524, it was decided by the Court of Appeal that the term "shipment" in an English contract means the loading of goods on to a ship; hence a custom that "shipment" means placing goods on railway cars would be inconsistent with the contract. See *The Turid*, [1922] 1 A. C. 397.

The effect and operation of the contract of sale of a ship or cargo in a foreign port is generally considered in connection with the last branch of the subject, and the cases on the point may be here again briefly recapitulated, though they have already been treated of while considering the transfer of personal property generally. The only question which can well arise as to the contract of sale in such a case must be as to its validity, which is not, strictly speaking, part of the nature and incidents of an

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Sale in
foreign port.

(e) For a lucid account, see "The Hague Rules, 1921," by C. R. Dunlop, K.C., Journ. Comp. Leg. and Int. Law, Feb., 1922, p. 24, and "The Hague Rules Explained," by Sanford D. Cole, 1924.

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obligation at all. If a chattel is once duly sold, the property in it is passed once for all, and the obligation momentarily created, being completely fulfilled, ceases to exist. Consequently there can be no opportunity of questioning what law is to govern its future incidents and development. A sale, in fact, partakes more of the nature of an act than of a contract. It is an act preceded—sometimes only instantaneously preceded—by a contract, with which it is often confounded. There may, of course, be a contract *for* sale, the fulfilment of which is postponed or delayed; but the ordinary sale is intended to operate at once, and is, in fact, a mere transfer. As such, there would seem to be but little excuse for testing its validity, in an English Court, either by English law as the *lex loci*, or the maritime general law, if that can be regarded as at all distinguishable from the law administered in all cases in the English Court of Admiralty (*f*). Nor does it appear much more reasonable to refer the question to the law of the ship's flag, which the sale itself in most cases is intended to change. In cases of hypothecation or affreightment, the ship remains under the same flag during the whole existence of the obligation, and the intention of the parties may reasonably be presumed to have included submission to the law of which that flag gave notice. No such intention can be assumed, it is plain, in the case of a foreign purchaser in a foreign port. The ship is a mere chattel, the ownership of which is changed by sale, according to the law of every nation, and directly the ownership is changed, the vessel's nationality is changed with it. It is scarcely probable that the purchaser would expect the validity of the change to be afterwards tested by the law which the transaction purported definitely to abandon.

English
maritime
law—its
authority.

It is, however, only comparatively recently that the principle indicated by the foregoing considerations has been recognised, and formerly the obviously incorrect course of preferring the *lex fori* was adopted. In the case of *The Segredo* (otherwise *The Eliza Cornish*) (1853), 1 Spinks Ecc. & Ad. 36, the *lex loci actus* was definitely rejected by Dr. Lushington, and English maritime law, regarded as coincident in its application as to those particular facts with maritime law generally, followed in preference. It may be observed that the learned judge, in deciding this case, clearly intimated that he intended to follow, and conceived himself to be following, the *general* maritime law; and that he would not have deviated from it by introducing English municipal law, had a conflict arisen between them; but this distinction has been rendered of less importance by the *dictum* in *Lloyd v. Guibert* as to the non-recognition of any *general* maritime law differing from

(*f*) See per Willes, J., in *Lloyd v. Guibert* (1865), 1 Q. B. 125.

“maritime law, as administered in England.” It is, perhaps, after all, merely a distinction of words. Those who advocate the existence and authority of a “general maritime law,” mean in most cases a maritime law which is administered in English as well as in foreign Courts of Admiralty (g). It appears obvious that so much of this general maritime law, as administered in English Courts, is, by virtue of that very fact, English law; and it is not the less English because it is common to other foreign Courts of Admiralty as well as that of England. If it is suggested, as Sir R. Phillimore seems to imply, that the sources of its authority differ from those ordinarily cited in English Courts, and that it prevails by virtue of the comity of nations rather than by the binding force of English precedents, the argument appears scarcely warranted by facts. It would be difficult to cite an instance where a foreign decision on an analogous point has been allowed in an English Court of Admiralty to overrule English precedents of earlier date. Reference, it is true, has been constantly made to general European customs, and to regulations such as those contained in the Codes of Wisby and Oléron, but only for the purpose of enlarging the unwritten law of the Admiralty Court of England by analogy and example, and of supplying the deficiencies of its voice, when that was silent. The ordinary common law of the realm has similarly drawn nourishment from the jurisprudence of Rome, but it would be a misnomer to say that the *dicta* of Gaius, or the rescripts of Hadrian, ever spoke with a semblance of authority in English Courts. Authority is given to principles of foreign law or mercantile usage only by their adoption in an English Court.

The decision of Dr. Lushington in *The Segredo* (otherwise *The Eliza Cornish*) (h), however, was distinctly over-ruled by the Exchequer Chamber in *Cammell v. Sewell* (1861), 5 H. & N. 728, in 1860. There the master of a Prussian vessel, chartered in Russia by English shippers for Hull, and wrecked on the coast of Norway, sold the cargo without authority by English law, but under such circumstances that by the Norwegian law an innocent purchaser would have acquired a good title. It was argued that by the law maritime, general as well as English, the master had exceeded his authority, and that the sale was therefore invalid, but it was held (Byles, J., *dissentiente*) that the transaction, being a transfer of personal property, was governed by the *lex loci*; and that the title of the purchaser, being valid by that law, must stand. With regard to the case of *The Segredo*, which was relied upon by the owners of the cargo, Crompton, J., delivering

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Transfer
good by *lex*
loci.

(g) See per Sir R. Phillimore in *The Patria* (1871), L. R. 3-A. & E. 461.

(h) See Westlake, *Priv. Int. Law* (1922), pp. 191 *seq.*

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the judgment of the Court, said, “ If this case be an authority for the proposition that a law of a foreign country of the nature of the law of Norway, as proved in the present case, is not to be regarded by the Courts of this country, and that its effect as to passing property in the foreign country is to be disregarded, we cannot agree with the decision. . . . We think that the law on this subject was correctly stated by Pollock, C.B., in the course of the argument in the court below, where he says that if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere. And we do not think that it makes any difference that the goods were wrecked, and were not intended to be sent to the country where they were sold.”

Transfer
distinguished
from
executory
contract.

It has already been said that the decision in *Cammell v. Sewell* is entirely in accordance with the generally accepted theories which refer the validity of a transfer of movables *inter vivos* to the law of the place of transfer (*supra*, p. 284), nor is the principle of that case in reality at all inconsistent with the ground of the judgment in *Lloyd v. Guibert*. The contract to which, in the latter case, the law of the ship's flag, and in the former, the law of the place of contract, was applied, was in truth not the same in any sense. The judgment in *Lloyd v. Guibert* applied the law of the ship's flag to the contract of affreightment made between the master, as agent of the owner in a foreign port, and the shipper; and *as between these parties*, the law of the flag was held to govern the incidents of the obligation throughout, though its results were varied by circumstances which had been unforeseen. In *Cammell v. Sewell* the relation between the shipowner and the freighters was not in question, and in an action by the owners of the cargo against the master or owner of the ship, the law of the flag might, quite consistently with the decision actually given, have been applied. The contract which was there referred to the local law, and held to be valid in accordance with its provisions, was not the contract between freighter and master, but *the contract of sale* between the master and the purchaser of the wrecked cargo in Norway. It was this contract, and no other, which the Court declared to be binding, because sanctioned and confirmed by the local law, not only upon the parties to it, but upon third persons—strangers, in the strict sense of the term, to its provisions. The proper result of applying the principle of the decision in *Lloyd v. Guibert* to the facts of *Cammell v. Sewell* would be, that the right of the owner of the cargo to sue the shipowner or master for the sale of the goods in Norway would be tested by Prussian law, as the law of the flag alone; and that it would be no answer to such an action to show

that by Norwegian law the act of the master was justified, or regarded as binding upon shippers and consignees.

If this view be adopted, the strictures by Maclachlan (i) upon *Cammell v. Sewell* cannot be supported; and it is noticeable that the Court of Exchequer Chamber, referring to the case in the judgment in *Lloyd v. Guibert*, expressly abstained from expressing any opinion for or against the correctness of the decision. It is suggested by Maclachlan, that if the Prussian flag was notice to the freighter that the master's authority to bind his employers was limited by Prussian law, it was notice to the Norwegian purchaser of the same limitation. The distinction between an executory contract in which it is necessary that the master should bind those whom he represents and an executed contract of sale, which is in truth completely discharged by the transfer itself, seems to have been overlooked. In the former case the parties must necessarily have contemplated the subsistence of the obligation of the contract, and the performance of its provisions, during a considerable time; and they must therefore be regarded as having intended that some law should regulate the development of the obligation itself, and control the incidents which might arise, but for which it was difficult if not impossible to provide expressly. This law, it has been determined in *Lloyd v. Guibert* is the law of the ship's flag; i.e., the parties must be taken to have assumed that the law of the ship's flag would govern the future incidents of the obligation, the master having no authority to undertake that the owners of ship or cargo will do anything except as defined by that law. But in an absolute and immediate sale, such as that in *Cammell v. Sewell*, the master is not required to pledge his owners to anything. No future relations between the parties are contemplated, and therefore they cannot be taken to have referred to any law to govern the future incidents of the obligation. The master simply contracts to sell the ship or cargo according to the law of the place where they are lying, and he does actually so sell them while they are there. By the comity of nations—or, to speak more correctly, by those principles of international jurisprudence which the law of England, in common with the law of most civilised nations, adopts—a title to property which has once validly accrued according to the law of the situation is good as against all the world (*supra*, p. 288); and the purchaser is not to be put in a worse position because the master of the ship has carelessly or improperly mistaken and exceeded his instructions (k).

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(i) Law of Merchant Shipping (1923), p. 130.

(k) The contention in *Cammell v. Sewell* that the judicial proceedings in Norway, under which the cargo was sold, amounted to a judgment *in rem*, was

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of ship's
master—
exercise of

Nor is the doctrine of *Cammell v. Sewell* in itself new or opposed to the general weight of authority. It has already been said that the decision practically over-ruled the opinion of Dr. Lushington in *The Segredo*, but it is opposed to no other authority of any weight, and is in entire accordance with the views expressed by Lord Stowell in *The Gratitude* (1801), 3 Rob. Ad. 240, at p. 259. "Suppose the case," said Lord Stowell, in giving judgment, "of a ship driven into port with a perishable cargo, when the master could hold no correspondence with the proprietor; suppose the vessel unable to proceed, or to stand in need of repairs to enable her to proceed in time. In such emergencies the authority of agent is necessarily devolved upon him, unless it could be supposed to be the policy of the law that the cargo should be left to perish without care. What is to be done? He *must* in such case exercise his judgment, whether it would be better to tranship the cargo, if he has the means, or to sell it. It is admitted in argument that he is not absolutely bound to tranship; he may not have the means of transshipment; but even if he has, he may act for the best, in deciding to sell; if *he acts unwisely in that decision, still the foreign purchaser will be safe under his acts.*" In *Freeman v. East India Co.* (1822), 5 B. & Ald. 617, where the master *did* act unwisely in deciding to sell the cargo, the title of the foreign purchaser was not accepted as good for another reason. The sale took place at the Cape of Good Hope, and it was not shown that the Dutch law then in force there regarded the sale in at all a more favourable light than the English law would have done, or that there was any conflict between them as to its validity. It appeared, besides, that the purchaser was fully aware of the circumstances under which the master sold, and as he was necessarily taken to have been also cognisant of the law, he purchased with his eyes open, so as even to have precluded himself from finding protection under a sale in market overt (1), had the facts amounted to that.

Ship's master
—the agent
owner.

Before passing from the consideration of maritime contracts made with a shipmaster in a foreign port, it may be remarked that, in one point of view, the question is not of authority given to the master at all, that is, as something distinguished from the intimation afforded by the flag, when the owner is present *in propria persona*. Whether the owner is himself in the foreign port to contract himself, or whether he has sent his shipmaster there to contract for him, the parties to the contract must be

rejected by all the judges in the Exchequer Chamber, and has not therefore been here referred to. See *infra*, chap. xi.

(1) Coke, 2 Inst. 713.

equally regarded as contemplating the operation of the law of the flag upon their future relations under the obligation. "The present and like questions," says Willes, J., in *Lloyd v. Guibert*, "affect not only contracts entered into by masters of ships, the law of whose country distinguishes between the obligations of a contract by the master as such, and that of the owner himself, or his broker, or of the master acting with a plenary authority, but touch all contracts of affreightment entered into in respect of any vessel in a port foreign as to her, whether the master happen to be an owner or not." This principle is obviously a consequence of the natural idea of agency, inasmuch as a man who acts by an agent in a foreign country, acts there himself. In the *Albion Co. v. Mills (m)*, Lord Lyndhurst, L.C., said: "If I send an agent to reside in Scotland, and he, in my name, enters into a contract in Scotland, the contract is to be considered mine where it is actually made. It is not an English contract, because I actually reside in England. If my agent executes it in Scotland, it is the same as if I were myself on the spot, and executed it in Scotland." So the nature and extent of an agent's authority are to be measured by the law of the place where he is found acting as agent (n). And such authority is to be carried out according to the law of such place (o). If, there, a contract by the master of a ship, as agent for his owner, in a foreign port, is governed by the same rules as if the owner had himself been present, it is plain that when the owner himself is so present, and actually makes the contract in his own name, the law of the flag is to be applied to its future incidents, according to the rule laid down in *Lloyd v. Guibert*, just as much as if he had stayed at home.

In *The Luna*, [1920] P. 22, where the master of the *Luna* signed a towage agreement in ignorance that it contained an indemnity clause by which he agreed to indemnify the owners of the tug *Kingston* against all liability, it was held that he was bound by the indemnity clause, and that he had authority to bind his owners and that accordingly the owners of the *Kingston* were entitled to be indemnified by the owners of the *Luna* against the damages assessed against the *Kingston* in a collision action.

It need hardly be said that, since the law which is to govern future incidents of a contract must in all cases be a matter of intention, the parties may provide by express stipulation for certain probable contingencies, and declare beforehand to what law their legal consequences are to be referred. Thus, in con-

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Express provisions for contingencies—general average.

(m) (1823), 3 Wils. & S. 218, 333; 1 Dow. & Cl. 342; Story, § 285.

(n) *Maspons y Hermano v. Mildred* (1882), 9 Q. B. D. 530, 539.

(o) *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q. B. 79.

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tracts of marine insurance, it is common to insert a clause that the underwriters are to be liable for general average “as per foreign statement”; and this has been construed to mean, not only that the calculations of the foreign average-stater are to be accepted as correct, but that what is and what is not general average is to be decided by the law of the foreign port where the adjustment is made (*p*). So, where the underwriters agreed “to pay general average as per foreign statement, if so made up”; which was construed as an agreement to be bound by the opinion and decision of the foreign average-stater, both as to facts and law (*q*). And in *Hendricks v. Australasian Insurance Co.* (1874), 9 C. P. 460, where the underwriters agreed “to pay all claims and losses on Dutch terms, and according to statement made up by official *dispacheur* in Holland,” the voyage being from Java to Holland, it was held that the words expressing the risks insured against were to be construed by Dutch law, and that the average statement by the Dutch adjuster was binding on the underwriters. It can scarcely be said that the foreign law in each of these cases can be regarded as that of the place of performance, as the average loss, and consequently the adjustment, was a contingency which might never have arisen.

Foreign
statement of
average.

The above expressions seem sufficiently clear to show that the parties effecting the policies of insurance, as well as the underwriters, intended their obligation, *quoad* the contingencies referred to, to be regulated by the foreign law; but strong evidence is, no doubt, necessary to show that the parties to an insurance, effected in England with an English company, have in their minds anything but the English law (*r*). Thus, in *Greer v. Poole* (1880), 5 Q. B. D. 272, where there was an express provision in an English policy on cargo of a French ship, that general average was to be payable as per judicial foreign statement, it was held that the French law could not be invoked for the purpose of deciding what constituted a loss “by perils of the sea.” It was there said that, although it was competent to an underwriter on an English policy to stipulate that it should be construed and applied in whole or in part according to a particular foreign law, yet, except when so stipulated, the English law was to prevail. It is, however, sufficient to show a usage to pay losses according to the foreign statement, that being equivalent, when such that the parties are bound by it, to a special agree-

(*p*) *Mavro v. Ocean Insurance Co.* (1875), L. R. 10 C. P. 414.

(*q*) *Harris v. Scaramanga* (1872), 7 C. P. 481. See the construction of a similar provision in *De Hart v. Compania de Seguros* (1903), 72 L. J. 818 (K. B.).

(*r*) *Power v. Whitmore* (1815), 4 M. & S. 141; *Peninsular and Oriental Co. v. Shand* (1865), 3 Moo. P. C. (N.S.) 272; *Don v. Lippmann* (1837), 5 Cl. & F. 1.

ment (s). And it would seem that this usage, for underwriters to settle according to foreign adjustment, is sufficiently established in English law for it to be binding without an express provision to that effect, according to the authority of Phillips on Insurance, §§ 1413—4; but even then, according to the same writer, the foreign law is only entitled to regulate the adjustment, and not to make that an average loss which is not so according to the law of the country where the policy was effected. In *Mavro v. Ocean Marine Insurance Co.* (1875), 10 C. P. 414, Blackburn, J., said it was a question that had never been distinctly settled, whether under an ordinary English policy the English underwriter could be compelled to bear what was held to be a general average loss by the law of the foreign country where the adjustment was made, and that express clauses to pay “as per foreign statement” were frequently inserted in policies to avoid that very difficulty (t). *Power v. Whitmore* (1815), 4 M. & S. 141, which is said to have decided the question in favour of the underwriter, is explained by Cockburn, C.J., in *Dent v. Smith* (1869), 4 Q. B. 414, to have been generally misapprehended, there being no proof in that case that the loss in question was a general average loss even by the law of Portugal, where the adjustment was made. In *Dent v. Smith* the underwriters were held liable to repay moneys to the shippers of gold on board an English ship for Constantinople, which they had been compelled to pay in order to get the gold out of the hands of the Russian authorities at Gallipoli, where the ship had become stranded. After the insurance was effected, and before she sailed, the ship had been transferred to Russian owners, and had duly changed her nationality, a fact of which neither the plaintiffs nor defendants were aware; and this change alone had given the Russian authorities at Gallipoli jurisdiction. It was held that the underwriters were liable, on the ground that the plaintiffs had been compelled to pay the sum claimed as salvage, and were entitled to recover it as a loss by perils of the sea; so that, although the case was argued in some respects as one of the general average, no light was thrown upon that question.

The diversities in the law of general average adopted by different nations are so great (u), and the advantages promised by uniformity so apparent, that the subject has more than once

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average—
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law.

(s) *Newman v. Cazalet*, Park, Marine Insurance (8th ed.), p. 900.

(t) *Walpole v. Ewer* (1789), Park, Marine Insur. (8th ed.), p. 898, is often cited as an authority for the affirmative, but may probably be regarded as over-ruled by *Power v. Whitmore*, and the other cases cited above. In *De Hart v. Compania de Seguros* (1903), 72 L. J. K. B. 818, the clause adopting the foreign statement was qualified by special language, which the Court construed in favour of the foreign statement.

(u) See Comparative Table in Lowndes' General Average, 1922, p. xxxiv.

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engaged the attention of reformers. International Congresses for this purpose have repeatedly been held, at several of which a code of rules has been prepared and recommended for adoption (Glasgow, 1860; London, 1862; York, 1864). A Bill was prepared in 1860—62, which was intended to incorporate the code of rules adopted at Glasgow, but proved ill-adapted for its purpose, and was abandoned. The rules which were drawn up at York were pressed upon the attention of the English Government by the associated Chambers of Commerce, and repeated attempts made to obtain adoption of them from the Legislature; but these attempts were unsuccessful; and in 1877 a revised form of these rules was adopted by the International Law Association at Antwerp, under the name of "The York-Antwerp Rules" (*x*).

These rules were open to some criticism. In 1890 they were revised and enlarged at the Liverpool Conference of the Association and finally adopted by the Genoa Conference of 1892 (*y*).

At the Twenty-First Conference of the Association at Antwerp in 1903, what is known as the "Antwerp Rule" was added (*z*). That the general scope of the rules required still further extension was, however, recognised, and at the London Conference of the Association in 1910 a committee was appointed to report on the actual state of the law (*a*). This report was presented to the Conference held in Paris in 1912 by Judge Dowdall, K.C., when the committee was entrusted with the task of preparing a code dealing generally with the principles and practice (*b*). This was presented by Judge Dowdall to the Madrid Conference in 1913 and provisionally accepted (*c*). In 1923 the Association once more turned its attention to the matter and in January, 1924, a joint meeting was held in London, under the presidency of Sir Henry Duke, of the General Average Committee of the Association, and members of the Average Adjusters Association. It was resolved that (*a*) rules of practice should be formulated so far as the same are not now expressed or are insufficiently expressed in the York-Antwerp Rules; (*b*) the law of general average, so far as international agreement thereon exists or can be obtained, be ascertained and stated. The Average Adjusters Association undertook to prepare a revised draft of the rules and to report in June. In the meantime, the Chamber of Shipping of the United Kingdom, on 22nd February, 1924, resolved to co-operate, and in May the International Ship-

(*x*) Rep. Antwerp Conference, 1877, International Law Association.

(*y*) Reports, Liverpool Conference, 1890; Genoa Conference, 1892.

(*z*) Rep. Antwerp Conference, 1903, pp. 176, 250.

(*a*) Rep. London Conference, 1910, p. 538.

(*b*) Rep. Paris Conference, 1912, pp. 498-9.

(*c*) Rep. Madrid Conference, 1913, p. 52.

ping Conference met in London and unanimously agreed to the necessity for a revision of the rules and the embodiment in them of a general declaration of the principles underlying them. At the meeting of the General Average Committee in London it was resolved that a draft should be prepared embodying a revision of the rules and a declaration of general principles. This draft was presented to the Conference of the Association held at Stockholm in September, and as revised was accepted. It will be found set out in the Appendix to the present chapter. These rules do not purport to be, and are not in fact (*d*), declaratory of English law, but in practice, throughout their existence, they have been widely adopted, either in whole or in part, as part of the contract.

With regard to general average sacrifice, Bovill, C.J., laid down the following rule as settled law in *Fletcher v. Alexander* (1868), 3 C. P. 375, viz. : "If, however, after the jettison or the matter which is the subject of average has arisen the remainder of the goods are totally lost, and so no benefit accrues to the owners of the other goods from the jettison, no contribution can be claimed. The whole law on the subject is founded on the principle that the loss to the individual whose goods are sacrificed for the benefit of the rest is to be compensated according to the loss sustained on the one hand, and the benefit derived on the other." A further question, however, has arisen whether this rule is to be applied to the case of expenditure by the shipowner. It was held by Sankey, J., in *Chellaw v. Royal Commission on the Sugar Supply*, [1921] 2 K. B. 627, that where a shipowner incurs a general average expenditure and subsequently the ship and all her cargo are totally lost, the shipowner is not entitled to claim contribution from the cargo-owners.

Contracts of marine insurance are governed by the Marine Insurance Act, 1906 (6 Edw. 7, c. 41). They are contracts of indemnity against marine losses, *i.e.*, losses incident to marine adventure, occasioned by "maritime perils" as defined in the Act. Being contracts of indemnity the assured must have an insurable interest as defined by the Act. By s. 4 policies, "interest or no interest" are void as being by way of gaming or wagering.

It was held by Lush, J., in *Greer v. Poole* (1880), 5 Q. B. D. 272, that an English insurer of goods shipped by an English merchant on board a foreign ship is not affected by the law of the flag.

In *Bernard v. Rodocanachi Son & Co.* (1880), 5 C. P. D. 424,

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(*d*) *Svendsen v. Wallace* (1886), 10 A. C. 404; overruling *Attwood v. Sellar* (1878), 4 Q. B. D. 354.

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the plaintiff insured against war risks and cargo on a United States merchant vessel, which was destroyed during the American Civil War by the *Alabama*. The plaintiffs paid the amount of the policies as and for an actual total loss, although the cargo was of greater real value. The defendants recovered the balance from the United States Government out of the general compensation paid by Great Britain in respect of the Alabama Award. It was held by Lord Coleridge, C.J., that in consequence of the actual total loss, the valued policies as between the parties were conclusive of the value of the cargo and that the defendants were trustees of it for the plaintiffs, who were entitled to recover it in an English Court. The Act of Congress dealing with the compensation provided that no claim should be allowed on behalf of any insurer outside the United States. Although, said Lord Coleridge, this might prevent the plaintiffs from recovering in the American Courts, it could not affect the rights of litigants in English Courts. If by English law the plaintiffs were entitled, an English Court must give it to them, although it may have been the intention of the American statute by which the defendants got the money that the plaintiffs should not have it.

The subject of marine insurance generally was further considered at the Glasgow Conference of the International Law Association, 1901, Mr. Justice Gorell Barnes being in the chair, and Lord Alverstone, L.C.J., and Lord Phillimore being present and taking part in the discussion, besides many other eminent international lawyers. The result was the approval of a code of rules for marine insurance generally, which were recommended for international adoption. They were originally drafted and introduced by Mr. Carver, K.C. The rules as adopted will be found as an Appendix to this chapter (e).

Contracts
for carriage
by land and
sea.

*Cohen v.
South-
Eastern Ry.
Co.*

With regard to contracts for carriage or transit by land and sea, it is obvious that it may be often left very doubtful what law was intended by the parties to govern the incidents of the carriage and the contingent liabilities of the carriers. The question arose in *Cohen v. South Eastern Railway Co.* (1877), 1 Ex. D. 217; (1878) 2 Ex. D. 253, in respect of a contract entered into with an English railway company, at their office at Boulogne, for carriage of a passenger and his luggage from Boulogne, *via* Folkestone, to London. The luggage fell into the sea by the negligence of the defendants' servants, and was so lost; and the question arose whether the liability of the defendants, who had endeavoured to limit it by a notice on the back of the passenger's ticket, was governed by English or French law. It was ultimately held that they were liable by English law, and, as the

(e) Rep. Glasgow Conference, 1901, p. 267.

defendants did not deny that they were so by the law of France, it was unnecessary to decide the question of conflict. Mellish, L.J., however, in the Court of Appeal said : “ I confess for my own part that, the contract being made by an English passenger with an English railway company regulated by English law, I should have supposed that it ought to be governed by the law of England, and be taken as made with regard to the law of England. And the more so for this reason, that Parliament having passed Acts to regulate the traffic by both railways and steamboats, when the steamboats belong to the railway company, and there being certain clauses in these Acts for the protection of passengers, I should not be willing to think that the railway company could escape from the stringency of those Acts by having a booking-office in a foreign country; the object being to carry a variety of traffic which was intended to be regulated by Parliament by sea and by land.” It is plain that the real force of this argument lies in the consideration that the passenger would be the more likely to have contracted with an eye to the English law, because he knew that the company was an English company, subject generally to English law, and that the English Legislature had passed certain Acts which purported to regulate the object for which he was contracting. The judges of the Court of Appeal, however, were by no means agreed upon this inference of intention. Baggallay, L.J., whilst guarding himself against being supposed to be expressing any decided opinion, intimated that it appeared to him that there was much to be said in favour of the law of France; whilst Brett, L.J., the third member of the Court, whilst apparently agreeing with Mellish, L.J., that the English law was applicable to the facts of the particular case, where the journey only commenced at Boulogne, thought it probable that, if the starting-place had been Paris instead, the first part of the journey at any rate would have been governed by the law of France. It has been already pointed out that, in such a case, the law of the place where the contract was made could have no right, as such, to assert its supremacy. The real question would be, looking at all the circumstances of the case, the thing to be done, the situation of the starting-point, the destination, the intermediate distance, the nationality and domicil of the parties contracting, and the terms of the contract, by what law did the parties intend that the unforeseen incidents of their contract should be governed? It may be remarked that in the particular case under discussion, the passenger had accepted a ticket, the conditions on the back of which referred to the company’s by-laws; and inasmuch as these by-laws derived their force and authority from the English Legis-

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liability.

lature, this would seem a strong argument to show that the parties ought to have intended that the law of England should govern the whole transaction (*f*). There is, however, another principle applicable to the case which has not yet been considered. It will be shown presently that the manner and extent of the performance of a contract are referred almost universally to the law of the place where the contract is to be performed. The contract of a carrier is performed in the place where he carries, not in the place whence he starts, or to which he is destined. It may reasonably be contended that he contracts to carry in the manner authorised by, and with the liabilities for negligent carriage imposed by, the law of the country through which the transit is made; and that in such a journey as that supposed, from Paris to London, the French law would apply during the first portion, by railway from Paris to Boulogne; and the English law during the remainder, when the passenger and his luggage were on English soil, or on board an English ship. "Whether that part of the contract which has to be performed in France," said Brett, L.J., in *Cohen v. South Eastern Railway Co.*, "must in strictness be said to be performed according to French law, I know not." It would certainly not be inconsistent with principle, and it is doubtful if it would even be inconvenient in practice, to consider that the parties intended the liability of the carrier to vary according to the law of the country through which the transit was made, having regard to the fact that the ordinary and established means of conveyance in both countries were made use of. The inference of intention would of course be quite different if the contract was one to carry by private and special means through several jurisdictions, and it cannot be too frequently repeated that the question of the law applicable is one of intention alone. And this is the ground upon which the decision of the Privy Council in *Peninsular and Oriental Co. v. Shand* (1865), 3 Moo. P. C. (N.S.) 272, must be taken to have proceeded, where it was held that the carrier's liability, the agreed carriage being from Southampton to Mauritius, *via* Alexandria and Suez, was governed by English law, and not by the law of France, which was in force at the place of destination. The carriers in that case were an English company, the passenger being also English by nationality and (apparently) domicile, and almost the whole of the transit was to be performed in one of their ships, with the exception of the railway journey across the Isthmus of Suez. The effect of the Egyptian law, however, was not alluded to, and nothing in fact turned upon that part of the journey. The Court,

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contract—
by what law
governed.

(*f*) See *Peninsular and Oriental Co. v. Shand* (1865), 3 Moo. P. C. (N.S.) 272, 291.

in giving judgment, after alluding to the difficulty of saying by what law the nature and obligation of a contract was to be governed, and the conflict of decisions on the question, stated the *prima facie* rule, that the law of the country where a contract was made must generally be taken to govern as to its nature, obligation, and interpretation, and that the parties must be understood as having agreed to submit themselves to it, and proceeded to show how the intention was directly to be inferred from the facts before them, as follows : “ This is a contract made between British subjects in England, substantially for safe carriage from Southampton to Mauritius. The performance is to commence in an English vessel in an English port ; to be continued in vessels which for this purpose carry their country with them ; to be fully completed in Mauritius ; but liable to breach, partial or entire, in several other countries in which the vessels might be in the course of the voyage. Into this contract, which the appellants frame and issue, they have introduced for their own protection a stipulation, professing in its terms to limit the liability which, according to the English law, the contract would otherwise have cast upon them. When they tendered this contract to the respondent, and required his signature to it, what must it be presumed that he understood to be their intention as to this stipulation ? What would any reasonable man have understood that they intended ? Was it to secure to themselves some real protection against responsibility for accidental losses of luggage and for damage to it ; or to stipulate for something to which, however clearly expressed, the law would allow no validity ? This question leaves untouched, it will be observed, the extent of the contemplated protection ; it asks, in effect, was it intended that the stipulation in case of an alleged breach of contract should be construed by the rules of the English law, which would give some effect to it, or by those of the French or any other law, according to which it would have none, but be treated as a merely fruitless attempt to evade a responsibility inseparably fixed upon the appellants as carriers ? . . . If their lordships take the respondent to have understood the intention of the appellants in the first way, they must take him to have adopted the same intention ; it would be to impute want of good faith on his part to suppose that with that knowledge he yet intended to enter into a contract wholly different on so important an article ; he could not have done this if the intention had been expressed, and there is no difference as to effect between that which is expressed in terms and that which is implied and clearly understood. The actual intention of the parties, therefore, must

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parties to
bill of
exchange.

be taken clearly to have been to treat this as an English contract, to be interpreted according to the rules of English law.”

In matters relating to bills of exchange, much difficulty appears to have been felt by the Courts in deciding by what law the nature and incidents of the drawer's, acceptor's, and indorser's contract respectively are to be defined—a difficulty which may be partly due to the want of any clear distinction between the abstract nature of the obligation, which has reference to no particular place (apart from the intention which it is necessary that the law should presume), and those incidents which arise from acts and facts to be, if at all, in some particular locality. The earlier tendency appears to have been in favour of referring all questions touching the obligation and liability of the drawer or indorser of a bill of exchange to the law of the place where his contract is made (*g*); and *Allen v. Kemble* (1848), 6 Moo. P. C. 314, has been cited to show that the contracts of the drawer and indorser, as well as that of the acceptor, ought to be determined by the law of the country where the obligation first attached (*h*). It must be remarked of the decision in *Allen v. Kemble*, first, that the *dicta* of Lord Kingsdown in the judgment were in reality unnecessary to the case before the Court (*i*); and secondly, that the conclusion drawn from them as above expressed is hardly warranted by their actual terms. In *Allen v. Kemble* the assignees of the bankrupt holder of a bill of exchange, drawn and indorsed in Demerara, accepted in Scotland, payable in London, sued the drawer and indorser in Demerara instead of the acceptor, in order to avoid a set-off which the acceptor had against the bankrupt holder. By the Roman-Dutch law then in force in Demerara, a surety is entitled to the benefit of any cross-claim which the principal may have against the creditor, and the Privy Council held that this law was equally applicable, although the liability of the principal arose in a foreign country. Nothing turned on the law relating to bills of exchange, and the question would have been precisely the same if the action against the parties in Demerara had been brought on a guarantee given by them in respect of goods supplied

(*g*) See now, as to formalities, interpretation, and incidents of the acceptance or indorsement of a bill, the provisions of 45 & 46 Vict. c. 61, s. 72 (Bills of Exchange Act, 1882).

(*h*) It may be here pointed out that according to *Moulis v. Owen*, [1907] 1 K. B. 746 (Moulton, L.J., dissenting), it seems that where an Englishman issues an instrument in a foreign country and makes it payable in England, the validity of the consideration involved must be decided by English law. A cheque had been given in the French Colony of Algiers, but payable in London; and it was held that the payment of the cheque, given for a gambling transaction which is illegal in this country, could not be enforced here.—As to the lawful character of consideration, see also *Saxby v. Fulton*, [1909] 2 K. B. 208; and *Browne v. Bailey* (1908), 24 T. L. R. 644.

(*i*) See per Cockburn, C.J., *Rouquette v. Overman* (1875), 10 Q. B. 525, at p. 540. The arguments in favour of the *lex loci* are collected in Story on Bills, § 296, n.

to a party in England (*k*). The case is simply an illustration of the principle which has already been fully discussed, that the law of the place where a contract is made is *prima facie* that intended to define the contractor's obligation; and that a person entering into a contract of suretyship in Demerara expects and is expected to have all the advantages, if sued upon default of the principal or in his place, that the law of Demerara gives him.

During the Franco-German War, 1870, by French decrees the time for the payment and protest of bills was enlarged. In *Rouquette v. Overman and Schore* (1875), 10 Q. B. 525, a bill of exchange was drawn and indorsed by the defendants in England upon French subjects in Paris, and accepted by them in Paris. The bill on the face of it was payable on 5th October, 1870. Before that date the Emperor of the French enlarged the time for the payment and protesting of current bills of exchange for one month; subsequently the time was further enlarged by the French Government for the time being. By these enlargements the defendants' bill did not become payable till the 5th September, 1871. On that day it was presented to the acceptors and payment refused; it was duly protested and due notice of dishonour, etc., given to all the parties. *Held*, that the defendants were liable on the bill at the suit of their indorsee for value. It is well settled, said Cockburn, C.J., that the time when a bill becomes due depends on the *lex loci solutionis* and when a bill payable in a foreign country is drawn and indorsed in this country, the sufficiency of notice of dishonour must depend upon the place of payment.

This principle was applied during the war of 1914. In *In re Francke and Rasch*, [1918] 1 Ch. 470, bills accepted payable in an enemy country after the outbreak of war had been drawn by an enemy firm carrying on business in England and purchased from the firm before the war by an English bank, in whose hands they remained unpaid. The due date according to the tenor had passed, but presentment had not been made. German emergency legislation postponed the maturity of bills till further notice, and in the case of British creditors forfeited interest between the original due date and the end of the period of postponement. On a claim by the bank against the assets in a winding-up of the business of the firm under the Trading with the Enemy (Amendment) Act, 1916, it was held by Younger, J., that the due date, being determinable by the law of the enemy country where the bills were payable had not yet arrived. Consequently the claim failed.

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(*k*) Per Cockburn, C.J., in *Rouquette v. Overman* (1875), 10 Q. B. at p. 541.

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interest on
bill of
exchange.Contract of
drawer and
indorser.

It is in reality by a mere application of this rule that the liability of a drawer and of an acceptor of a bill of exchange to pay interest, when sued for the amount, has been held to be dependent upon the law of the place where they first assumed liability at all—i.e., where their respective contracts were made. As to the acceptor, this was held as long ago as 1840 by Lord Langdale in *Cooper v. Waldegrave* (1840), 2 Beav. 282; and the same principle has since been applied to the contract of the drawer in *Gibbs v. Fremont* (1853), 9 Ex. 25. Not merely the liability of the acceptor to pay interest, but his liability to pay at all on his showing that he had not sufficient effects of the drawer in his hands at the time of the acceptance, was referred in a much older case to the law of the country where the acceptance was given (l); and it was laid down in *Scott v. Pilkington* (1862), 2 B. & S. 11, that all questions of the acceptor's liability which have no relation to the manner of performing the contract, or to the consequences of non-performance, depend upon the same law. So far the presumption that no law is in the mind of the parties but the law of the place of contract, is not interfered with. The case assumes a very different form when the incidents of payment, dishonour, protest, and notice, which must necessarily arise at some particular place and in accordance with some particular law, occur to complicate the question.

The drawer or indorser of a bill, who by the drawing or indorsement becomes the surety for the due performance of the acceptor's contract, knows, first, that the payment of the bill must be at the place where it is made payable. Secondly, he knows that the time of the payment, whether lengthened or not by days of grace, is to be determined by the law of the place where it is made payable; and when it is accepted generally, by the law of the place of the acceptance (n). Now if the bill is not paid according to the law of the place of payment, when presented according to that law, he, the surety, will become liable to be called upon to pay in place of the principal. Before, however, he can be so called upon, certain preliminaries, in addition to presentment and non-payment, must be fulfilled. It is at least reasonable to presume that these incidents of *non-payment* will be governed by the same law that applies to all the incidents of

(l) *Burrows v. Jemino* (1726), 2 Str. 733; *Wynne v. Callander* (1826), 1 Russ. 295. See also *Potter v. Brown* (1804), 5 East, 124.

(n) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 72 (3), (4), (5); Byles on Bills (1911), pp. 339-340; *Rouquette v. Overman* (1875), 10 Q. B. 535. Cf. *Embiricos v. Anglo-Austrian Bank*, [1905] 1 K. B. 677, a case in which a bill was taken *bona fide* and without negligence by an Austrian bank under a forged indorsement in Austria, and forwarded to London by the bank to the defendants for collection; held, that the validity of the title of the Bank to the bill was determined by Austrian law.

payment. It is the acceptor's contract that he guarantees, and he may fairly expect that the performance and the non-performance of that contract will be defined by the same law—the law of the place where it ought to be performed.

In accordance with this principle, and to this extent, it has been held that the obligations of the drawer and indorser, as sureties, are to be measured by the same law as the obligations of the acceptor (*o*). In *Rothschild v. Currie* (1841), 1 Q. B. 43, the bill was drawn in England, accepted in Paris, payable there, and indorsed in England to the plaintiff. Upon the dishonour of the bill by non-payment on presentation, notice was given to the plaintiff in England, and transmitted by him to the defendant, who had indorsed the bill to him. Some delay, however, had occurred about the protest, and the notice to the defendant of dishonour, though in time by the French law, was too late by the law of England. An action having been brought against the defendant as indorser and surety, it was held that the plaintiff was entitled to recover, inasmuch as the notice of dishonour was sufficient by French law, being the law of the place where the payment was to have been made. Some dissent has been expressed from this decision on the apparent ground that the contract of a drawer or indorser is to be governed by the law of the place where he affixes his name, that being the law which imposes the obligation upon him once for all; and that the contract of the surety is a fresh contract to pay in the place where he signed (*p*). The principle of *Rothschild v. Currie* is certainly defensible upon the ground which it has been above attempted to indicate, and has since been followed so often as to stand virtually beyond the reach of criticism. *Hirschfield v. Smith* (1866), 1 C. P. 340, was a case arising out of similar circumstances, the question being, as in *Rothschild v. Currie*, whether a notice of dishonour was sufficient if given in conformity with the law of the country where the bill was payable only, and it was decided in the same way; not only upon the authority of the previous case, the probable accuracy of which had up to that time been considered questionable, but upon the further ground, that even assuming the indorser's contract to be governed by the law of England, as the place of indorsement, yet the law of England ought to accept as reasonable notice of dishonour such notice as was required by the law of France, where the bill was payable. This is in effect merely what has been said before, that, according to English views of private international law, the intention of the

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^(o) *Rouquette v. Overman*, "which may be regarded as over-ruling *Mellish v. Simeon* (1794), 2 H. Bl. 378": *arguendo* in *Horne v. Rouquette* (1878), 3 Q. B. D. 514.

^(p) Story on Bills, § 296, n.

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indorser must be assumed to have been to bind himself to accept as reasonable notice of dishonour, notice according to the law of the country where the bill was payable. "The indorser of a bill accepted payable in France," said Erle, C.J., in his judgment, "promises to pay in the event of dishonour in France, and notice thereof. By his contract he must be taken to know the law of France relating to the dishonour of bills, and notice of dishonour is a portion of that law." In *Horne v. Rouquette* (1878), 3 Q. B. D. 514, the bill was dishonoured for non-acceptance, and the action was by indorsee against indorser. In conformity with *Rothschild v. Currie*, it was held that the necessity for notice of dishonour depended upon the law of Spain, where the bill was made payable, and should have been accepted. *Rouquette v. Overman* (1875), 10 Q. B. 525, was a case in which the real question was again that which had been decided in *Rothschild v. Currie*, but the circumstances under which the law of the place of payment had postponed the presentation for payment and notice of dishonour were exceptional. The bill was drawn and indorsed in England, and accepted payable in France, the day for payment, according to its tenor, being the 5th of October, 1870. Pending the currency of the bill, the German army having invaded France the Emperor Napoleon issued an edict extending the right of action on all negotiable instruments then current for a month, and deferring payment for that time. After the change of government, similar laws were passed from time to time, and published by the executive for the time being, further extending the period of delay in the case of all current negotiable instruments, the effect of which was ultimately to extend the day of payment of this particular bill to the 5th of September, 1871. On that day it was duly presented, dishonoured, and protested; and notice of dishonour and protest according to the law of France was sent to the English indorsee (the plaintiff), and through him to the defendants, the drawers and indorsers. The plaintiff having paid the amount due on the bill to those to whom he had indorsed it over, sued the defendants, his indorsers, for indemnity; and it was contended that they were discharged, inasmuch as the bill had not been presented for payment at the proper time, according to its tenor, nor had notice of dishonour been then given. It was held, in strict accordance, as is submitted, with *Allen v. Kemble* (1848), 6 Moo. P. C. 314, and *Gibbs v. Fremont* (1853), 9 Ex. 25, no less than with *Rothschild v. Currie*, that the proper time for payment, and the proper time for notice of dishonour, was the time fixed by the law of the country where payment was to have been made; and that inasmuch as the presentation, protest, and notice of dis-

honour had all been in strict conformity with the law of France, though eleven months after the date named in the bill, the plaintiff and his indorsees had done all that was required of them, and the defendants were liable upon their contract as indorsers. The effect of 45 & 46 Vict. c. 61, s. 72, on this point, is to determine the duties of the holder as to presentment, protest, and notice of dishonour, to the law of the place where the act is or ought to be done or where the bill is dishonoured. The whole section may be usefully presented here, and is as follows :

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S. 72. Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows :

- (1) The validity of a bill as regards requisites in form is determined by the law of the place of issue; and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance *supra* protest, is determined by the law of the place where such contract was made.

Provided that—

- (a) Where a bill is issued out of the United Kingdom, it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue;
- (b) Where a bill, issued out of the United Kingdom, conforms as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid between all persons who negotiate, hold, or become parties to it in the United Kingdom.
- (2) Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance *supra* protest of a bill, is determined by the law of the place where such contract is made.
Provided that where an inland bill is indorsed in a foreign country, the indorsement shall as regards the payee be interpreted according to the law of the United Kingdom.
- (3) The duties of the holder with respect to presentment for acceptance or payment, and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured.
- (4) Where a bill is drawn out of but payable in the United Kingdom, and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.
- (5) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.

The nature and obligation of the contract of the drawer and indorser, and the amount of their liability, being thus determined *prima facie* by the law of the place where they contracted, where there is nothing to show that a different law was intended, and by the law of the place where the bill is accepted and payable, in all matters which relate to performance or non-performance there by

Acceptor
of bill—
liability of.

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the acceptor, it is plain that the acceptor's contract must be measured by similar principles. No case appears to have been discussed in which the acceptor has accepted in one country a bill payable in another; but, in analogy with the cases just cited, it would seem that a distinction ought under such circumstances to be drawn between his abstract liability to pay at all under his contract on the one hand, and the incidents, mode, and conditions of payment on the other. The question, whether he ever became bound, would be decided by the law of the place where he entered into the assumed obligation; the question what he became bound to do, by the law of the place in which he became bound to do it. The obligation, however, of the acceptor of a bill of exchange is not in every sense absolute. It is virtually a contract to pay to the payee or his order, if he makes one, that is, to pay to an indorsee, if an indorsement is regularly made. The question then arises, what is a regular and sufficient indorsement? In other words, when the acceptor (in his implied contract) used the expression "indorsement," what description of indorsement was meant?

The modern cases on this question may be conveniently summarised, before entering on their discussion, in the following form :—

The acceptor in England of a bill drawn and payable in England contracts to pay on any indorsement valid by English law (*q*).

So does the acceptor in England of a bill drawn in France payable in England, when there is evidence on the face of the bill that it was intended, so far as regarded the acceptor, to be an English bill for all purposes (*r*).

But it has been held otherwise, and that the law of the place of indorsement (France) must be satisfied, when the bill was drawn in France, and there was no such indication of intention (*s*).

The Bill of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 72, has now enacted that the validity as regards form of the contracts of acceptance and indorsement is determined by the law of the place where the contract is made. But where a bill issued abroad conforms in form to English law, it may be treated as valid between all persons who negotiate, hold, or become parties to it in the United Kingdom.

In *Trimbey v. Vignier* (1834), 1 Bing. N. C. 151, a promissory note was drawn and indorsed in blank in France, and the action

Indorsement
of bill—by
what law to
be tested.

(*q*) *Lebel v. Tucker* (1867), L. R. 3 Q. B. 77. Of this case Romer, L.J., said in *Alcock v. Smith*, [1892] 1 Ch. 238, that "it has been made law, if it was not so before, by the proviso in s. 72, sub-s. (2) of the Bills of Exchange Act, 1882."

(*r*) *Smallpage's Case* (1885), 30 Ch. D. 598.

(*s*) *Bradlaugh v. De Rin* (1868), L. R. 3 C. P. 538; 5 C. P. 473 (*sed qu.*).

was brought by the indorsee against the maker, who stands, of course, in the same position as the acceptor of a bill of exchange. By the French law, as the Court understood it on the evidence submitted to them, an indorsement in blank was not sufficient to entitle the plaintiff to sue in his own name, and it was held accordingly that he could not do so here. In other words, the contract of the maker of the note was to pay to the payee; or if an indorsement was made according to the law of France, then, and then only, to the indorsee. The question of the right of an indorsee, under an indorsement *not* made according to the law of France, to sue in his own name, was therefore not one of procedure or remedy at all, but touched the very essence of the maker's contract; and was governed by the law of France, where that contract, expressing no intention to adopt the provisions of any other law, was made. It will be observed that in this case the bill was drawn as well as accepted in France; so that the question whether the acceptor's liability to pay on indorsement will be determined by the law of the place of acceptance as such, is left undecided by it. The case of *Lebel v. Tucker* (1867), 3 Q. B. 77, was the exact converse. There the bill was drawn, accepted, and payable in England, the blank indorsement only being made in France, and being ineffectual by French law to transfer the right of action, according to the same view of that law as that taken in *Trimbey v. Vignier* (t). It was held, in strict accordance with the principle of the former case, that the contract of the acceptor was to pay to an order valid by the law of England (the place where the bill was drawn and accepted); and that the imperfection of the indorsement according to the law of France, where it was made, was no answer to an action by the indorsee against the acceptor. The *ratio decidendi* of the judgment is given by Lush, J., as follows: "The defence is, that the indorsement was made in France, and is not conformable to the law of France, which requires that the indorsement should bear a date, and express the consideration for the indorsement and the name of the indorsee. The question is, is that any answer to an action against the acceptor of an English bill? . . . The contract on which the present defendant, the acceptor, is sued was made in England. . . . His contract, if expanded in words, is, 'I undertake, at the maturity of the bill, to pay to the person who shall be the holder under an indorsement from you, the payee, made according to the law merchant.' How can that contract of the acceptor be varied by the circumstance that the indorsement is made in a country where the law is different from the law of

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Indorsement
—sufficiency
of.

(t) But, according to Cockburn, C.J., in *Bradlaugh v. De Rin* (1868), L. R. 5 C. P. 473, 475, the French law was misunderstood by the Court in that case.

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England? The bill retains its original character; it remains an inland bill up to the time of its maturity, and is negotiable according to English law; and by the English law a simple indorsement in blank transfers the right to sue to the holder. . . . The judgment in *Trimbey v. Vignier* proceeded on the ground that the contract, that is, the contract of the maker of the note, having been made in France, must be governed by the law of France. So here, the contract of the acceptor, having been made in England, must be governed by the English law. It would be anomalous to say that a contract made in this country could be affected by the circulation and negotiation in a foreign country of the instrument by which the contract is constituted. The original contract cannot be varied by the law of any foreign country through which the instrument passes."

Indorsement
invalid by
lex loci.

The above reasoning would in itself appear conclusively to show that the law of the place of acceptance, in that right alone, must determine the validity of any indorsement of a bill; but the subsequent case of *Bradlaugh v. De Rin* (1868), 5 C. P. 473, had the effect of leaving the question in a most unsatisfactory condition. In the two cases which have just been considered, the place of drawing and acceptance was the same, being in the first France, and in the second England. In *Bradlaugh v. De Rin* the bill was drawn in France and accepted in England. The holder sued upon an indorsement made in blank in France, alleged to be imperfect according to the same view of French law which the preceding cases involved; and the question was thus directly raised, whether the law of the place of acceptance alone was entitled to decide the validity of the transfer. The Court was divided, Bovill, C.J., and Willes, J., holding that it was not; and that inasmuch as the bill was drawn and indorsed in France, and the indorsement was insufficient by the French law (according to their view of it) to transfer the drawer's right of action *as between the drawer* (who was the indorser) *and the indorsee*, it was also insufficient to give the indorsee any right of action against the English acceptor. It was not noticed by the majority of the Court that this reasoning, if valid at all, was applicable with almost equal force to the circumstances of *Lebel v. Tucker*. Montague Smith, J., on the other hand, held that, as against the English acceptor, the French indorsement, though imperfect by French law, was sufficient; adopting in full the principle laid down in *Lebel v. Tucker*, that the contract of an English acceptor in England was to pay to any order or indorsement of the payee which was valid by the mercantile law of England. The Court being thus divided, the case was carried to appeal, where it went

off upon a different ground, leaving the question now under consideration untouched. It had been assumed in all the preceding cases (*u*) that the French law did in fact absolutely disentitle the holder of a bill of exchange, under a blank indorsement made in France, from suing in his own name, and arts. 137 and 138 of the Code du Commerce had been relied on. The Court of Exchequer Chamber, however, were unanimously of opinion that this construction of the French law was wrong, and that it had not been shown, therefore, that the blank indorsement sued on in *Bradlaugh v. De Rin* was insufficient to pass the right of action even by the law of the place where it was made. It was conceded that such an indorsement effected a procuration, and Cockburn, C.J., after examining the French authorities (*x*), pointed out that such a procuration entitled the indorsee to sue in his own name, subject only to the contingency that any defence might be used against him which could have been maintained against the indorser. The decision of the majority of the Court below was consequently reversed, but no confirmation was thereby given to the opinion of Montague Smith, J., on the question of the conflict of law; and the judgments given, indeed, seem studiously to have avoided any intimation of the views taken by the judges upon it. All that was decided was that the indorsement was sufficient to give the indorsee a right of action even by French law, and that it was therefore unnecessary to say whether he would have been allowed to sue here if that had not been the case.

It cannot be said that the judgment of Pearson, J., in *Smallpage's Case* (1885), 30 Ch. D. 598, left this vexed question definitely decided. The bill of exchange which was the subject of litigation was indorsed in France, being drawn in France in English form, accepted in and payable in England. The indorsement was insufficient by French law, but it was held that the indorsee was entitled on the ground that the bill "was intended to be an English bill of exchange for all purposes, at all events as regards the acceptors." The judgment rested on the facts, showing that the bill spoke of English current money, and was in English form (though translated into French). It can scarcely, therefore, be regarded as an express authority for the bare proposition that the form of the indorsement depends upon the law of the place of acceptance or payment. It did in that particular case, because the judge thought the facts showed that the acceptor so intended. Whether in every case an acceptor

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(*u*) *Trimbey v. Vignier* (1834), 1 Bing. N. C. 151; *Lebel v. Tucker* (1867), 3 Q. B. 77; *Bradlaugh v. De Rin* (1866), 3 C. P. 538.

(*x*) Code du Commerce, arts. 137, 138; Paillet, *Manuel de Droit Français*, ii. 1140, nn. 3-6; Bédarride, *Lettre de Change*, i. p. 430, §§ 321-22.

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ought not to be presumed so to intend is still in a sense an open question, *Lebel v. Tucker*, in addition to *Smallpage's Case*, being a strong authority on the one hand; and the decision of the majority of the Court of Common Pleas in *Bradlaugh v. De Rin (y)*, Montague Smith, J. (*dissentiente*), on the other. The judgment of Willes, J., in the latter case proceeded on the ground, as has been said, that an indorsement imperfect by the law of the place where it is made is inoperative as between the indorser and indorsee, and therefore cannot transfer to the latter the right of the indorser to sue the acceptor. This argument was, however, expressly noticed and dismissed as immaterial in *Lebel v. Tucker*, when the real question was, it is submitted, correctly pointed out. What did the acceptor contract to do? to pay on an indorsement good according to the law of England, or only on an indorsement good by that law and also by the law of the particular country where the bill happened to be when the indorsement was made? It seems reasonable to suppose, in accordance with the reasoning of Lush, J., cited above (p. 465), that no other law but that of England could have been in his contemplation. He had no reason, apparently, to assume that the bill would be indorsed in France; and it might just as well have been carried before indorsement to Vienna or St. Petersburg, in which case the Austrian or Russian law would have similarly claimed to regulate the validity of the transfer. With the rights of the indorser and indorsee *inter se* the acceptor has nothing to do; and it is clear that no drawer, who has indorsed and parted with his acceptance for valuable consideration and in conformity with the English law, would be entitled to sue him upon it. The other argument used, that the bill in *Bradlaugh v. De Rin* was French in its inception, and regarded as foreign by the English law for the purpose of protest, is in reality opposed to the principle it was cited to establish. A bill drawn abroad is regarded as foreign for the purpose of protest only to this extent, that without formal protest as a foreign bill no action can be maintained against the drawer. That is, the drawer's liability is measured by the law of the place where he enters into his contract; and upon the same principle, so should be the liability of the acceptor (z).

The case of *Alcock v. Smith*, [1892] 1 Ch. 238 (a), should be referred to here, inasmuch as Kay, L.J., there summarises the effect of the cases just discussed. The judgment, however, pro-

(y) The question is, of course, concluded for English lawyers by s. 72 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61).

(z) See now the provisions of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 72, summarised *supra*, p. 463.

(a) On assignment of movables, *supra*, pp. 283 *seq.* Cf. also *Embiricos v. Anglo-Austrian Bank*, *supra*, p. 460.

ceeded not on the form or effect of the indorsement of the bill in that case, but on the effect of a judicial sale of the bill under regular proceedings in a foreign country.

Closely analogous to the question of the indorsement abroad of bills of exchange is that of the transfer by indorsement or assignment of promissory notes. Promissory notes made payable to bearer pass from hand to hand in England under a statutory provision (3 & 4 Anne, c. 9), and the contract of the maker, according to English law, is thus to pay to the bearer, *i.e.*, the assignee by mere delivery of the original payee. On the principle of *Lebel v. Tucker* (1867), 3 Q. B. 77 (b), it would therefore seem that the law of the place where the delivery is made is immaterial, and that the bearer has an equal right to sue in England though the transfer to him was by that law ineffectual. And accordingly in *De la Chaumette v. The Bank of England* (c) it was held that a promissory note made in England payable to bearer was transferable by mere delivery in France. It was not, however, shown or found in that case that the law of France required more than delivery, though it was apparently assumed that it did so. And it may be also remarked that this case has been cited for the limited proposition that notes or bills payable to bearer, made *and payable* in England, are transferable by delivery abroad, although by the law of the country where the transfer takes place mere delivery is inoperative to pass the right of action (d). It is difficult, however, to see how the place of payment is material. A note made in England derives all its assignability from the English law, and it is not apparent why that assignability should be limited because the maker stipulates that he shall only be called upon to pay in a different country. The manner and mode of payment are no doubt measured by that law (*supra*, p. 458), as all other questions connected with the performance of the maker's contract; but his original liability to pay the bearer, to whom the property has passed by proper transfer, has no more to do with performance than his liability to the payee; and the law of the place where his contract is made has as much claim to govern one liability as the other.

It may be remarked that it was held on more than one occasion that the English statute (3 & 4 Anne, c. 9), rendering promissory notes transferable applied to notes made without the jurisdiction (e). Those decisions, however, were simply given

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Assignability
of promissory
notes.

Effect of 3 &
4 Anne, c. 9.

(b) But see *contra*, *Bradlaugh v. De Rin* (1868), 5 C. P. 473.

(c) (1831), 2 B. & Ad. 385; see S. C. 9 B. & C. 208.

(d) *Gorgier v. Miéville* (1824), 3 B. & C. 45.

(e) *Bentley v. Northouse* (1827), Moo. & M. 66; *Milne v. Graham* (1823), 1 B. & C. 192. See, however, *contra*, *Carr v. Shaw*, cited in Bayley on Bills, 4th ed. 22.

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upon the words of the statute, which provided that “all notes” should be negotiable in the manner specified; and was interpreted as meaning that, within the jurisdiction, all notes which came under the descriptive words, without regard to the place of their making, should be transferable accordingly. “It is for the advantage of commerce,” the Court said, in the latter case, “that foreign as well as inland bills should be negotiable.” No question of international law is necessarily involved in this interpretation, unless it had been shown, which it was not, that the law of the country where the note was made absolutely prohibited its negotiability. In a country where such a prohibition existed, a note in such a form as to come within the provisions of the statute would never have been made at all.

Agreement
to accept
bill.

It has been seen above (p. 458), that the contract of the acceptor of a bill is to be governed by the law of the place of acceptance, following the *prima facie* rule that contracting parties intend their liability to be regulated by the law of the place where it is created. This doctrine has been extended from the contract of acceptance to the mere agreement to accept. In *Scott v. Pilkington* (1862), 2 B. & S. 11, the action was brought on an American judgment, the original claim in America being against the defendants for breach of a contract made in New York to honour acceptances of third parties, from whom the plaintiffs had purchased bills drawn on the faith of the defendants' promise. The defendants resided in England, and their contract was accordingly to accept the bills there; but the Court of Queen's Bench held that the American tribunal had rightly applied the law of New York to their liability, and that it was therefore necessary to decide how far a foreign judgment may be examined for a mistake in English or private international law (*infra*, C. XI.). “The question at issue,” said Cockburn, C.J., “has no relation to the manner of performing the contract, or to the consequences of non-performance. . . . It is contended that the law of England, as that of the place of performance, ought to prevail. We are of a contrary opinion, it appearing to us that the question of the defendants' liability must be determined by the *lex loci contractus*.” It was stated in the course of the judgment that, if the promise of the defendants had been given in England, the English law would not have held them liable to third parties who should purchase bills drawn on them for acceptance from the drawers; but that liability was imposed by the law of the place where the contract was made, and it was held that the American Court had rightly applied that law.

In *Guaranty Trust Co. of New York v. Hannay*, [1918] 2 K. B. 623, the defendants, who carried on business in Liverpool,

purchased cotton from dealers in the United States, who drew a bill of exchange on the defendants' bank in Liverpool in the following terms: "Sixty days after sight this first of exchange (second unpaid) pay to the order of ourselves £1,409 9s. 0d. value received, and charge the same to account of 100/R.S.M.I. bales of cotton," and issued the bill in the United States. The plaintiffs, who were dealers in bills in New York, in good faith purchased the bill of exchange with the bill of lading of the cotton attached and sent the documents to the defendants' bank in Liverpool, who by arrangement with the defendants accepted the bill and paid it at maturity. The bill of lading was a forgery and no cotton had been shipped under it. The defendants, upon the discovery of the fraud, brought an action in New York against the plaintiffs to recover the amount of the bill so paid by them, upon three grounds: (a) warranty by the Guaranty Trust Co. that the bill of lading was genuine and that the cotton therein described had been shipped; (b) a representation by them to the same effect; (c) mistake of fact, namely, genuineness of the bill of lading and shipment of cotton under it. The American Court held that the draft and acceptance was conditional and directed a verdict for Messrs. Hannay. This judgment was reversed by the United States Circuit Court of Appeal upon the ground that the case was governed by English law (1913), 210 Fed. Rep. 810. The plaintiffs thereupon brought this action in England claiming declarations that they did not, by presenting the bill for acceptance with the bill of lading attached, warrant or represent the bill of lading as genuine and that they were not bound to repay the amount of the bill. In the action before Bailhache, J., the jury found that the plaintiffs did not warrant the genuineness of the bill of lading. The jury having been discharged, the learned judge eventually held that the question whether the bill of exchange was conditional or not had, under s. 72 (1) of the Act, to be determined by American law; that by that law the bill was conditional, and that consequently the defendants were entitled to recover the money back. Upon appeal this judgment was reversed and it was held that, whether the question of the validity of the bill was to be determined by English or American law, it was unconditional. The law relating to negotiable instruments, said Warrington, L.J., as expressed in the American statutes, is in all material respects identical with the British statute.

The divergences in the law of different States relating to bills of exchange, and the resulting inconveniences, gave rise to considerable discussion at the Bremen and Antwerp Conferences (1876 and 1877) of the International Law Association; and it may be of interest to quote the code of rules to regulate this subject

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Code of
proposed
rules for bills
of exchange.

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which was adopted at the latter Conference, as given in the Report for that year of the Association.

Principles for an International Law to govern Bills of Exchange.

1. The capacity to contract by means of a bill of exchange shall be governed by the capacity to enter into a contract generally.

2. To constitute a bill of exchange it shall be necessary to insert on the face of the instrument the words "Bill of Exchange" or their equivalent.

3. It shall not be obligatory to insert on the face of the instrument, or on any indorsement, the words "value received," nor to state the consideration.

4. Usances shall be abolished.

5. The validity of a bill of exchange shall not be affected by the absence or insufficiency of a stamp.

6. A bill of exchange shall be deemed negotiable to order, unless restricted in express words on the face of the instrument or on an indorsement.

7. The making of a bill of exchange to "bearer" shall not be allowed.

8. The rule of law of *distantia loci* shall not apply to bills of exchange.

9. A bill of exchange shall be negotiable by blank indorsement.

10. The indorsement of an overdue bill of exchange which has not been duly protested for dishonour for non-payment shall convey to the holder a right of recourse only against the acceptor and indorsers subsequent to due date. Where due protest has been made, the holder shall only possess the rights of the indorser to him against the acceptor, drawer, and prior indorsers.

11. The acceptance of a bill of exchange must be in writing on the face of the bill itself. The signature of the drawee (without additional words) (*f*) shall constitute acceptance, if written on the face of the bill.

12. The drawee may accept for a less sum than the amount of the bill.

13. In case of dishonour for non-acceptance or for conditional acceptance, the holder shall have an immediate right of action against the drawer and the indorsers for payment of the amount of the bill and expenses, less discount.

(*f*) See *Hindhaugh v. Blakey* (1878), L. R. 3 C. P. 136, to meet which decision the statute 41 & 42 Vict. c. 13, was introduced; re-enacted by s. 17 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), making signature a sufficient acceptance.

14. The cancellation of a written acceptance shall be of no effect.

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15. When the acceptor shall have committed an act of bankruptcy before due date, the holder shall have an immediate right of action against the drawer and indorsers for payment of the amount of the bill and expenses, less discount.

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16. No days of grace shall be allowed.

17. The holder of a bill of exchange shall not be bound, in seeking recourse, by the order of succession of the indorsements, nor by any prior election.

18. Protest, or noting for protest, shall be necessary to preserve the right of recourse upon a bill of exchange dishonoured for non-acceptance or non-payment.

19. Immediate notice of dishonour shall be necessary to preserve the right of recourse upon a bill of exchange (g).

20. The time within which protest must be made shall be extended in the case of *vis major* during the time of the cause of interruption, but shall not in any event exceed a short period of time to be fixed by the code.

21. No annulling clause need be inserted in duplicates.

22. A simultaneous right of action on a bill of exchange shall be allowed against all or any one or more of the parties to the bill.

23. The surety upon the bill (*donneur d'aval*) shall be primarily liable with the person whose surety he is.

24. The capacity of a foreigner to contract by means of a bill of exchange shall be governed by the law of his country; but a foreigner who enters into a contract of exchange, being incapable of binding himself by such a contract in his own country, shall be bound, if he is capable of binding himself by such a contract under the law of the country in which he contracts.

25. In the foregoing articles the term "bill of exchange" shall include "promissory note," where such interpretation is applicable; but "promissory note" shall not apply to coupons, bankers' cheques, and other similar instruments in those countries where such instruments are classed as promissory notes.

Reference may be made here to the Hague "Convention on the Unification of the Law relating to Bills of Exchange and Promissory Notes," 1912, and to the "Resolutions of the same Conference concerning a Draft Uniform Law of Cheques" (Parl. Pap. 1913 [Cd. 6680], pp. 17-52). Great Britain declined to

(g) Substituted at the Frankfort Conference (1878) of the International Law Association for "Default of notice of dishonour for non-acceptance or non-payment shall not entail upon the holder or other parties to a bill of exchange the loss of their right of recourse for the amount of the bill, but the defaulting party shall nevertheless be liable for any damage occasioned by such default." See Rep. Frankfort Conference, 1878.

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take part in this Conference, refusing to consent to substitute nationality in place of domicile as the criterion of capacity to contract. In the Peace Treaties this Convention is not included in the list of multilateral treaties, conventions and agreements which alone are to be applied as between Germany and her Allies and those of the Allied and Associated Powers party thereto.

Authority of
agent.

Agency.—It has been seen that the obligation of a contract, throughout the incidents of its development, but excluding all questions which relate to performance, depends upon the law to which the contracting parties intended to submit themselves for the purposes of their contract; and that this law will be, in the majority of cases, the law of the place where the contract was made. When, however, a man contracts by his agent in a foreign country, the question of the extent of that agent's authority, and of the liability of the principal on his agreements, presents itself as a distinct part of the obligation between the principal and the person with whom he has contracted. The cases have been already considered which relate to the authority of a master of a ship in a foreign port to pledge the credit or property of the owners of ship or cargo (*h*), or to dispose of either by sale. It was shown, however, that the rules by which the agency of a ship-master are governed are in themselves peculiar, and not necessarily applicable to the case of an agent who stands in no such exceptional position. The ordinary rule of course is, that the man who contracts in a foreign place by an agent does so in point of law by himself: "*Qui facit per alium facit per se.*" "If I, residing in England," said Lord Lyndhurst, "send down my agent to Scotland, and he makes contracts for me there, it is the same as if I myself went there and made them" (*i*). And on this principle it would seem that if once you clothe a man with general authority to represent himself as your agent in a foreign country, those who contract with him there may fairly presume that he is your agent in the sense in which their local law interprets the term. In the absence of anything to indicate a contrary intention, they may be also taken to have supposed that the contract with you as principal, as well as the relation between principal and agent, would be governed by that law. When the agent is the master of a ship, the fact that she flies a foreign flag is, on the principle of *Lloyd v. Guibert* (*j*), sufficient to indicate

Contract by
agent abroad.

(*h*) *Supra*, pp. 429 *seq.*; *Lloyd v. Guibert* (1865), 1 Q. B. 115.

(*i*) *Pattison v. Mills* (1828), 1 Dow & Cl. 342, 363. Cf. *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q. B. 79, C. A.; *Maspons v. Mildred* (1882), 9 Q. B. D. 530.

(*j*) (1865), 1 Q. B. 115; *supra*, p. 430; *The Osmanli* (1849), 3 W. Robb. 198; *The North Star* (1860), 29 L. J. Ad. 73, 76; *The Nelson* (1823), 1 Hagg. Ad

an exceptional intention that the obligation of the contract shall not be governed by the local law. In such cases, as before explained, the law of the flag is taken to be that to which both parties have submitted themselves for the purposes of their contract; but in the cases of ordinary mercantile agency there is nothing to indicate a similar intention. It may be added here, that in the case of bottomry bonds at least, it is assumed to have been the intention of the parties that not only the obligation and incidents, but the formalities of the contract, should be governed by English law (*k*). The author last cited protests against the attempt to control such cases as those of foreign bottomry bonds by any principles of private international law. English maritime law, according to his view, is not a municipal law at all, and is therefore not included in a subject which treats of the conflict of municipal laws alone; though it is admitted that Story expresses a practical dissent from this view. It is difficult, indeed, to see how it is consistent with any logical classification of law whatever. Municipal law is properly all law, written or unwritten, enacted or adopted by a sovereign State for the use of its own Courts, or developed by those Courts from such enactments and adoptions. Private international law is the system or collection of principles on which the Courts of any particular State act, when one or more foreign municipal laws claim to compete with the municipal law of their own Government, and when it is doubtful how far the domestic municipal law which those Courts are primarily bound to obey was intended to apply to the particular circumstances, subject-matter, or persons of the litigation. Theoretically speaking, this system or collection of principles is the same, or should be the same, in the Courts of all civilised States; and, so far as uniformity is attained or attainable, the subject of private international law approaches to the dignity of a science. According to this view, all principles of law must be either municipal or international, and English maritime law appears plainly to be a compound of both; differing not at all, in this particular, from English mercantile law and many other branches of jurisprudence. It is owing to the nature of its subject-matter that so much of the municipal law contained in it has been borrowed from foreign sources; and that a conflict of municipal laws, to be solved by the principles of private international law, so often arises in its administration. The attempt, however, to treat English maritime law as something anomalous and distinct in itself (*l*) appears illogical and unnecessary.

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English
maritime
law.

169; see Brodie's note to Stair's Inst. ii. 955, cited Story, Conflict of Laws; 286 b (*k*) MacLachlan, Shipping (1923), p. 128.

(*l*) MacLachlan, Shipping (1923), pp. 128 *seq.*; see on this question, *Lloyd v.*

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Incidents.

English agent
of foreign
merchant
regarded as
principal.

With regard to the question of foreign agents, an exception has been grafted by the English mercantile law on the ordinary law of agency, which it will be as well to notice in this place. The rule that an undisclosed principal is liable on the contracts which are entered into by his agent on his behalf, has been held not to be applicable to the case of a foreign constituent contracting by an English commission merchant in this country. "It is well known in ordinary cases, where a merchant resident abroad buys goods here through an agent, that the seller contracts with the agent, and there is no contract or privity between him and the foreign principal" (*m*). The nature of this exception is better explained in *Armstrong v. Stokes* (1872), 7 Q. B. 598, where it is said by Blackburn, J., delivering the judgment of the Court: "The great inconvenience that would result if there were privity of contract established between the foreign constituents of a commission merchant and the home suppliers of the goods has led to a course of business, in consequence of which it has been long settled that a foreign constituent does not give the commission merchant authority to pledge his credit to those from whom the commissioner buys them by his order and on his account. It is true that this was originally (and in strictness is perhaps still) a question of fact; but the inconvenience of holding that privity of contract was established between a Liverpool merchant and the grower of every bale of cotton which is forwarded to him in consequence of his order given to a commission merchant at New Orleans, or between a New York merchant and the supplier of every bale of goods purchased in consequence of an order to a London commission merchant, is so obvious and so well known, that we are justified in treating it as a matter of law, and saying that, in the absence of evidence of an express authority to that effect, the commission agent cannot pledge his foreign constituent's credit." Both these cases were recognised and adopted in *Hutton v. Bullock* (1874), 9 Q. B. 572, and in the Exchequer Chamber, Keating, J., intimated that the question was not wholly one of fact, inasmuch as the presumption of law was against holding that an English agent had authority so to bind his foreign principal. These cases would, no doubt, be followed, even though the law of the country where the foreign principal was domiciled, or from which he sent authority to the English agent, imposed upon him the liability which the English law does not. Except in the event of such an additional element for con-

Guibert (1865), 1 Q. B. 125; *The Segredo* (1853), 17 Jur. 738; 1 Spinks, Ecc. & Ad. 36; *The Hamburg* (1864), 33 L. J. Ad. 116; *The Patria* (1871), L. R. 3 A. & E. 461.

(*m*) *Smyth v. Anderson* (1849), 18 L. J. C. P. 109; 7 C. B. 33.

sideration being introduced, the principle on which they rest does not strictly belong to the domain of private international law.

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Performance.

Performance
—controlled
by *lex loci*
solutionis.

(3) *Performance of the Contract*.—The performance of a contract, when a special place for performing it is expressly or impliedly agreed upon, is regulated as to mode, time, and conditions by the law of that place (*n*). This is, of course, in accordance with the intention of the parties; for to whatever law they may be presumed to have submitted themselves as far as the formalities of the contract are concerned (*supra*, p. 388), or the unforeseen incidents which may arise out of the obligation (*supra*, p. 423), it can hardly be doubted that those who contract that a thing shall be done in a particular place intend it to be done in the manner prescribed by the law of that place, and no other. And so the nature and extent of a power of authority, intended to be acted upon in a country other than the place of execution, are determined by the law of the country where the authority is acted upon, and the agent must carry it out according to that law (*o*). But as the intention of the parties is the true test, there may be exceptions even to this general rule. As Bowen, L.J., said, in *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D., at p. 601, “Even with respect to any performance that is to take place abroad, the parties may still have desired that their liabilities and obligations shall be governed by English law.”

Where no place of performance is agreed upon, expressly or by implication, the intention is presumed to be that the contract shall be performed where it was entered into, and where the promiser assumed his liability (*p*). Thus we have seen, in the case of a bill of exchange, that the contract of an acceptor is governed, so far as the time and mode of payment are concerned, by the law of the place where the acceptance was given (*q*). When, however, a bill is accepted payable at a particular place, the contract of the acceptor is to pay there and nowhere else; and all the incidents of payment, such as the right to an extension of the time by days of grace (*r*), or the sufficiency of notice of dishonour (*s*), are tacitly submitted to the operation of the law of

(*n*) Per Tindal, C.J., in *Trimbey v. Vignier* (1834), 4 M. & S. 695, 704.

(*o*) *Chatenay v. Brazilian Subm. Tel. Co.*, [1891] 1 Q. B. 79; *Mildred v. Maspons y Hermano* (1882), 9 Q. B. D. 530; 8 App. Ca. 974.

(*p*) *Don v. Lippmann* (1837), 5 Cl. & F. 1, 12, per Lord Brougham. It appears from this case that the Scottish law under similar circumstances considers the place of intended performance to be that of the promiser's domicile when the time for performance arrives.

(*q*) *Supra*, pp. 458 *seq.*; *Cooper v. Waldegrave* (1840), 2 Beav. 282; *Burrows v. Jemino* (1726), 2 Str. 733; *Potter v. Brown* (1804), 15 East, 124; *Rouquette v. Overman* (1875), 10 Q. B. 525.

(*r*) See Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 72.

(*s*) *Rothschild v. Currie* (1841), 1 Q. B. 43; *Hirschfield v. Smith* (1866), 1 C. P. 340; *Rouquette v. Overman* (1875), 10 Q. B. 525.

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performance.Contract
for carriage
within two
jurisdictions.

that place. The liability of the debt to carry interest, and the rate at which that will be calculated, will similarly depend upon the law of the place where payment is to be made (*t*); which will be, as already pointed out, the place where the contract for payment was made if no special place of payment was agreed upon. The old cases upon the question of the lawful rate of interest in cases of a conflict of law upon that point are collected by Westlake (*u*), but have lost much of their importance since the usury laws have been repealed; but it has been decided that, in the event of a subsequent contract in consideration of forbearance for a higher rate of interest than that originally stipulated for, entered into in a country whose usury laws differ from those of the place of the first agreement, the law of the place of the new contract will prevail, both in the case where it permits a higher rate (*x*), or imposes a lower rate (*y*), than the law of the original agreement. So a payment of a smaller sum in satisfaction of the whole, though not sufficient to discharge the debtor according to our law (*z*), has been held sufficient to discharge the drawer of a bill, and therefore, it would seem, the acceptor, when made in the country where the bill was drawn, and there regarded as a good and effectual accord and satisfaction (*a*). The question of the proper law applicable to the performance of a different kind of contract arose in *Cohen v. South Eastern Railway Co.* (1877), 2 Ex. D. 253, where a railway company had entered into a contract at Boulogne for the conveyance of a passenger and his luggage from that place to London, and it became a question what law was applicable to the carriage. It was not necessary to answer the doubt, as the defendants were confessedly liable for the loss which had occurred by the law of France, and were eventually held to be so by the law of England also; but the necessity, and at the same time the difficulty, of always referring questions relating to the performance of a contract to the law of the place of performance was well indicated by Brett, L.J.: "In this case the ticket is taken at Boulogne, and all that has to be done is to be performed on an English steamer and on an English railway. But in cases which occur every day, the ticket is taken in Paris, and the first part of the journey is performed on a French railway; the ticket is taken in Paris at an office, as everybody knows, held by the South Eastern Company, and on the head of the ticket,

(*t*) *Ferguson v. Fyffe* (1841), 8 Cl. & F. 121; *Ekins v. E. I. Co.* (1717), 1 P. Wms. 395; *Thompson v. Powles* (1828), 2 Simons, 194. Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 72.

(*u*) Westlake, Priv. Int. Law (1922), § 225, p. 299.

(*x*) *Connor v. Bellamont* (1742), 2 Atk. (Cas. temp. Hardw.) 382.

(*y*) *Dewar v. Span* (1789), 3 T. R. 425.

(*z*) *Cumber v. Wane* (1721), 1 Sm. L. C. (1903), p. 338, and notes.

(*a*) *Ralli v. Denistoun* (1851), 6 Ex. 483.

like this we have now before us, is ‘South Eastern Railway Company’; therefore the first part of the journey is performed under a contract made between the South Eastern Company in Paris and an Englishman; but the first part of the journey is to be carried out and performed on a French railway, and the two following parts on an English steamer and on an English railway respectively; and unless you could say that the three were entirely separate contracts, we should be called upon to say what law was to govern the first part of the journey, and whether that first part of the journey was to be ruled by the French law and the other two by the English law. I, therefore, should find considerable difficulty in saying whether the contract as to the first part of the journey was to be considered as a French contract or an English one.” When it is remembered that the question before the Court was as to the legal effect of a condition on the ticket issued by the railway company limiting their liability in the event of loss, it will be seen how strong was the tendency in the mind of the judge to admit the supremacy of the law of the place where the contract was to be performed, even if it became necessary for that object to subdivide the nature of the obligation which was undertaken once for all, and evidenced by a single written instrument. The more correct view is probably that such a question is in reality one of the interpretation of the contract, or, at any rate, of the nature of the obligation created by it, and does not properly belong to its performance at all. In such a case it has already been seen that the determination of the question depends *prima facie* upon the law of the place where the contracting parties entered into their agreement (p. 424); and this was in fact the substance of the decision in *Peninsular and Oriental Steam Navigation Co. v. Shand* (*supra*, p. 432); though in that case the law of England derived an additional claim from the fact that the parties were domiciled British subjects. It has been already pointed out that, where the parties to a contract may assume or impose any extent of liability at will, the question of the law applicable to the interpretation of the contract and the nature of the obligation is to be decided by a reference to their intention; and in the case just referred to, it was considered as improbable that British domiciled subjects contracting for carriage from an English port, commencing in an English vessel, could have had any other law in their contemplation but their own. In *Lloyd v. Guibert* (*supra*, p. 426), an attempt was made to extend the operation of the law of the place of performance even further than the suggestion in *Cohen v. South Eastern Railway Co.* (*supra*, p. 454). There a French ship was chartered by an Englishman at a Danish port for a voyage from Illyti to

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carriage—
law contem-
plated by
parties to.

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Havre, London, or Liverpool, at the charterer's option, the option being ultimately exercised by naming the last of these places. On the voyage the ship had to put into a Portuguese port for repairs, where the master gave a bottomry bond on ship, freight, and cargo. The owner of the cargo, having had to make certain payments in respect of this bond, sued the shipowners for indemnity; and the question was, by what law the liability of the shipowners was to be determined, they having abandoned the ship and freight to the shippers, and being thus, according to the law of France, freed from further liability. The law of France, as the law of the ship's flag at the time of the execution of the charter-party, was ultimately held entitled to prevail; but as none of the other competing laws similarly discharged the defendants, they were all, of course, put forward in the argument for the owner of the cargo. It was, perhaps rather extravagantly, contended that the law of England was entitled to be heard, as the law of the place of the final act of performance by the delivery of the cargo ("*quasi lex loci solutionis*"); but it is manifest, as was pointed out in the judgment, that the delivery was but a small part of the performance, by which the character of the whole contract could not reasonably be determined; and it may be added that the law of the place even of full performance has no right to decide the interpretation of the original contract, or the nature of the obligation created, in matters apart from the performance itself. There is nothing *prima facie* in such a contract to show that the parties to it intended to adopt the law of the locality of performance for any other matters than those which are necessarily connected with it.

Performance
—when
illegal.

The question of illegal performance has already been considered (p. 398), but it may be convenient to repeat here that when a contract, wherever made, contemplates some act or object which is forbidden by the law of the place of intended performance, the contemplated illegality will vitiate the whole agreement *ab initio* (b). Thus a contract, the performance of which in England, according to its intention, would have amounted to champerty, was held not the less void because made in a country where its object would have been legal, and with a subject of that foreign country (c). If, however, the performance of the contract in the country where that was intended to be done infringes no law, and the contract was made in a country by which its stipulations and consideration were lawful, the agreement is not void because the law of the place of performance would have forbidden

(b) Cf. *Moulis v. Owen*, [1907] 1 K. B. 746, C. A. See also *Biggs v. Lawrence* (1789), 3 Term Rep. 454.

(c) *Grell v. Levy* (1864), 16 C. B. (N.S.) 73; see *Heriz v. Riera* (1840), 11 Sim. 318. Cf. also *Quarrier v. Colston* (1842), 1 Ph. 147.

the exchange of the particular promise for the particular consideration within its own dominion. Thus, in *Branley v. South Eastern Railway Co.* (1862), 12 C. B. (N.S.) 63, a railway company which was forbidden by English statute to depart from a uniform rate of charge for carriage, was allowed nevertheless to contract in Boulogne for the conveyance of "packed parcels" (*colis groupés*) at an enhanced price, such a contract being permitted by the law of France, where it was made, and the conveyance of packed parcels, apart from the previous agreement as to price, being of course not illegal by the law of the place of performance. Here the carriage of the goods commenced, it will be seen, from a French port, and it by no means follows that the company could have contracted in their office at Boulogne or Paris for a carriage which was both to commence and end in English territory. Such a transaction would clearly amount to an evasion of the English law, and it is unnecessary to recapitulate authorities to show that the comity of nations never requires any law to recognise its own clandestine defeasance.

The cases in which general average is calculated according to the law of the port of destination are not, as has been already said, strictly cases which come under the head of performance at all. The effect of a stipulation, however, that underwriters are to be liable for average "as per foreign statement" has some connection with this branch of the subject. In such a case the construction which has been put upon the agreement is, not merely that the calculations of the foreign average-stater are to be accepted as correct, but that the decision of the law of the foreign port as to what is and what is not a general average loss is to be taken as conclusive (*d*), and that the opinion of the foreign average-stater both as to facts and law, is to bind all parties (*e*). Nor is the provision that general average is to be payable "as per judicial foreign statement" to be considered as adopting the foreign law for any other purpose, as, for example, in order to decide what constitutes a loss by "perils of the sea" (*f*). The desirability of establishing uniformity, by international agreement, in the rules applicable to the subject of general average, has been frequently discussed, as already stated (p. 452), at the Conferences of the International Law Association, resulting in a code of rules entitled the "York-Antwerp Rules, 1924," which will be found in an appendix to this chapter; but it is, of course, to be understood that, until adopted by the Legislature, no such agreement can have the effect of modifying the administration in English Courts of either municipal or private international law.

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Adjustment
of average—
not an
incident of
performance.

(*d*) *Mavro v. Ocean Marine Insurance Co.* (1875), 10 C. P. 414.

(*e*) *Harris v. Scaramanga* (1872), 7 C. P. 481.

(*f*) *Greer v. Poole* (1890), 5 Q. B. D. 272.

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Contract—
Performance.Delivery of
cargo.

When a vessel is chartered to deliver cargo at a certain port, the law or custom which prevails at the port of delivery is impliedly adopted for all that is to be done there. Thus in *Robertson v. Jackson* (1845), 2 C. B. 412 (g), the ship was chartered to take a cargo of coals from the Tyne to Algiers, and there deliver on payment of freight. The charterer engaged that the ship should be unloaded at a certain average rate per day; and that, in the event of further detention, he would pay for such detention at the rate of £5 a day, to reckon from the time of the vessel being ready to unload and *in turn to deliver*. It was proved that, according to the general regulations of the port of Algiers, vessels may commence unloading as soon as they enter within the mole; but that, by a special regulation of the French Government, coals destined for the use of the Marine Department were required to be unladen at a particular spot and in a given order. It was held by the Court of Common Pleas, that evidence was admissible to show that the words “in turn to deliver” had by the usage of the particular trade acquired a known meaning in reference to this special regulation with respect to coals for the use of the French Marine Department, although the shipowner was not cognisant of the fact that the coals had been shipped under a contract with the French Government; and that the special regulation as to the unloading of coals for the French Marine Department was to be considered one of the regulations of the port, binding upon all vessels entering it. These questions are, in fact, strictly connected with the *interpretation* of the contract and the intention of the contracting parties (*supra*, p. 415).

Contract
discharged
otherwise
than by
performance.

(4) *Discharge of Contract*.—The natural end of every contract is in performance or breach; but, under certain circumstances, the obligation may be discharged in a different manner. Such answers to actions on the contract as are in the nature of set-off or counterclaim belong clearly to the head of Procedure, on which the *lex fori* is supreme, and will be subsequently mentioned (*infra*, C. X.). Defences which arise under statutes or prescription or limitation are more ambiguous in their character, but it will be shown in their proper place that these matters also are strictly to be referred to the subject of Procedure (*h*), and have nothing to do with any supposed inherent quality in the contract. The question of discharge proper is therefore confined to the cases where the person under the obligation is released from the effect of his promise, and from the necessity of performing it, in a manner not contemplated by the original agreement, nor the mere

(g) See also *Hudson v. Clementson* (1856), 18 C. B. 213.(h) *Infra*, chap. x.; Story, Conflict of Laws, § 576.

indirect consequence of the peculiar rules of some particular tribunal as to the proper time and mode of granting a remedy. The instance most commonly given of such a discharge is that which results from the bankruptcy or insolvency of the debtor; but other instances, as, for example, the discharge of a surety by giving time to the principal, may be easily suggested. Tender is, in fact, a species of performance, and does not come within the present branch of the subject; while the defence of infancy, though referred to by Story under this head (i), is really based on an inherent defect in the validity of the obligation, and has been already discussed in its proper place.

With respect, then, to discharge proper, the rule is stated by Story to be that a defence or discharge, good by the law of the place where the contract is made or is to be performed, is to be held of equal validity in every other place where the question may come to be litigated (§ 331). The loose wording of this *dictum* leaves it doubtful which law is to govern the question of discharge when the contract is made within one jurisdiction to be performed in another; and the same phrase is repeated subsequently, where it is said conversely that a discharge of a contract by the law of a place where the contract was not made or to be performed will not be a discharge of it in any other country (§ 342). In the majority of the cases where a contract is discharged by bankruptcy, the contract discharged is a contract to pay money *simpliciter*, without any special reference to a particular place of payment or performance; and in those cases the maxim above quoted is well established in English law (k). "There is no doubt," said Bovill, C.J., in *Ellis v. McHenry*, "that a debt or liability arising in any country may be discharged by the laws of that country; and that such a discharge, if it extinguishes the debt or liability, and does not merely interfere with the remedies, or course of procedure to enforce it, will be an effectual answer to the claim, not only in the courts of that country, but in every other country. That is the law of England; and it is a principle of private international law adopted in other countries." And, as a general rule, apart from the question of the validity of a discharge by the law of the place of performance claiming to speak as the *lex contractus*, the converse proposition asserted by Story, that the discharge of a debt or liability by the law of a country other than that where the debt or liability was contracted will not discharge the debtor in any other country, has met with equal recognition

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Performance.

Discharge by
lex loci.

(i) Story, Conflict of Laws, § 332; *Male v. Roberts* (1800), 3 Esp. 163.

(k) *Ellis v. McHenry* (1871), 6 C. P. 228; 40 L. J. C. P. 109; *Phillips v. Eyre* (1870), 40 L. J. Q. B. 28; *Gardiner v. Houghton* (1862), 2 B. & S. 743; *Quelin v. Moisson* (1828), Knapp, 265; *Odwin v. Forbes* (1817), Buck, 57; *Potter v. Brown* (1804), 5 East, 124; *Burrows v. Jemino* (1726), 2 Str. 733.

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in English law. Thus, where the defendants, a French company domiciled in France, had contracted, by their agents in England, with the plaintiffs for the sale of copper to be delivered and paid for in England, it was held that discharge in a liquidation in France did not afford a defence to an English action for non-delivery; nor was the fact that the plaintiffs had proved in the liquidation regarded as any ground for staying proceedings here (*l*).

So far the subject has been considered with reference only to the legislation of independent sovereign States; but for English lawyers the case may most frequently arise with reference to the validity, in the subordinate jurisdiction, of a discharge created by the law of one country which has a paramount jurisdiction over the territory and tribunals of another. The question will then generally be how far the paramount authority intended to legislate, as it might lawfully do, for the tribunals of the subordinate jurisdiction. In the case of the Legislature of the United Kingdom enacting laws which are to be binding upon her colonies and dependencies, a discharge either in the colony or in the mother country may, by the Imperial Legislature, be made a binding discharge in both, whether the debt or liability arose in one or the other; and a discharge created by an Act of Parliament in England would at any rate be binding upon the Courts of this country, so as to compel them to give effect to it in an action commenced here (*m*). Thus it was laid down distinctively by Bayley, J., that a discharge of a debt pursuant to the provisions of an Act of Parliament, which is competent to legislate for every part of the United Kingdom, and to bind the rights of all persons residing either in Scotland or in England, and which purported to bind both classes of persons, operated as a discharge in both countries (*n*). So an English certificate in bankruptcy (*o*) has been decided to be a good answer to a debt arising in Calcutta and sued for in the Supreme Court there; or to an action on a debt contracted in Ireland and sued for in England, or to an action in the Scottish Courts on a debt contracted in Scotland. And on the same principle, a discharge under a Scottish sequestration, in pur-

(*l*) *Gibbs & Sons v. Société Industrielle et Commerciale des Métaux* (1890), 25 Q. B. D. 399, C. A.; *Smith v. Buchanan* (1800), 1 East, 6; *Bartley v. Hodges*, 1 B. & S. 375; *Ellis v. McHenry* (1871), 40 L. J. C. P. 109, 114; *Phillips v. Allan* (1828), 8 B. & C. 477; *Lewis v. Owen* (1821), 4 B. & Ald. 654.

(*m*) *Ellis v. McHenry* (1871), 6 C. P. 228.

(*n*) *Phillips v. Allan* (1828), 8 B. & C. 447. But *aliter*, where the Act under which the discharge is claimed is not intended to operate beyond its own limits (*New Zealand Co. v. Morrison*, [1898] A. C. 349; where it was held that the Joint Stock Companies Arrangement Act (1870) did not apply to the Colonies).

(*o*) On bankruptcy generally, as related to private international law, see Westlake, *Priv. Int. Law* (1922), chap. vi. See also *supra*, chap. vi. s. vi. and chap. vii. s. iv.

suance of an Act of the Imperial Parliament, has been held to be a good answer in an English Court to an action on a debt contracted in England (p). The discrepancy between these cases and the decision in *Lewis v. Owen* (1821), 4 B. & Ald. 654, is only apparent. It was held in that case that a certificate under an Irish bankruptcy was no discharge of a debt contracted in England; but the principal question there raised and decided was whether the debt had arisen in England or not. That question being answered in the affirmative, it was no doubt held that the debt was not barred by the Irish certificate; but the paramount effect of the Imperial legislation was not, and could not have been, taken into account, as the Irish bankrupt law at that time in force depended upon statutes of the Irish Parliament passed before the Union (q). In *Fergusson v. Spencer* (1840), 1 Mod. S. 987, where a similar question arose as to the effect upon an English debt of an Irish bankruptcy under the provisions of an Act of the Imperial Legislature (6 & 7 Will. 4, c. 14), it was held, in accordance with the principles previously stated, that the Irish certificate barred the English debt, and a certificate of conformity under the Irish Act (20 & 21 Vict. c. 60) had the same effect (s). But the discharge effected by the bankruptcy must, of course, be absolute and unconditional, whether the countries whose laws are in conflict are independent sovereign States, or stand in the same position to each other as England occupies with respect to the other members of the United Kingdom. Thus it has been held that a discharge in Scotland by a *cessio bonorum* under the general Scottish law, which only discharged the person of the debtor, was no answer to an action brought in the English courts for the recovery of an English debt (t): although, as already explained, the debt would have undoubtedly been held discharged if the discharge had been given under the authority of an Act of the Imperial Legislature, as was the case in *Philpotts v. Reed* (1819), 1 B. & B. 294, where a discharge in Newfoundland was held sufficient, though the debt had been contracted in England, and the action was brought in an English court.

The condition, that the debt should have been contracted within the jurisdiction of the paramount State, will not, in fact, be material so far as the Courts of that State, and of the jurisdictions subordinate to it, are concerned. "An adjudication of

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(p) *Edwards v. Ronald* (1830), Knapp. P. C. 259; *Quin v. Keepe* (1795), 2 H. Bl. 554; *Royal Bank of Scotland v. Cuthbert* (1813), Rose, 462, 486; *Sidaway v. Hay* (1824), 3 B. & C. 12.

(q) Per Bovill, C.J., in *Ellis v. McHenry* (1871), 40 L. J. C. P. at p. 115.

(s) *Simpson v. Mirabita* (1869), L. R. 4 Q. B. 257.

(t) *Phillips v. Allan* (1828), 8 B. C. 477; *Ex parte Burton* (1744), 1 Atk. 255.

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bankruptcy,” said Sir J. Colville in *Gill v. Barron* (1868), 37 L. J. P. C. 37, “followed by a certificate of discharge in this country under the bankruptcy laws passed by the Imperial Legislature, has the effect of barring any debt which the bankrupt may have contracted in any part of the world; and it would have the effect of putting an end to any claims in the island of Barbados or elsewhere, to which the appellant might have been liable at the date of the adjudication.” So Pollock, C.B., says in *Armani v. Castrique* (1844), 13 Mod. W. 447: “A foreign certificate is no answer to a demand in our courts, but an English certificate is surely a discharge as against all the world in the English courts. The goods of the bankrupt all over the world are vested in the assignees, and it would be a manifest injustice to take the property of a bankrupt in a foreign country, and then to allow a foreign creditor to come and sue him here.” And when the discharge is merely under the local law of a colony or dependency of the British Empire, without the authorisation of an Act of Parliament, it is plain that it cannot be assumed to operate upon a debt made and to be performed in England. “Neither was this debt contracted in Victoria,” said Blackburn, J., in *Bartley v. Hodges* (1861), 1 B. & S. 375, “nor to be discharged there, nor is either the plaintiff or defendant stated to be domiciled in that colony. . . . No case has been cited where the Act under which the discharge took place was not an Act of the Imperial Legislature; and I therefore conclude that no such case exists. The assertion that, because the colony of Victoria has power to make laws, all laws which it may make have power to bind us in England, sufficiently refutes itself; it is enough to state the proposition.” Notwithstanding the allusion in the passage just cited to the domicile of the parties, there appears to be no authority for saying that that circumstance will in any case give universal operation to the discharge of a debt which the rules already explained would refuse to recognise.

Effect of
English
bankruptcy.

By the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 28, a discharge under an English bankruptcy shall release the bankrupt from all debts provable under the bankruptcy (with the exception of Crown or Revenue debts and liabilities incurred by fraud or breach of trust or under a judgment for seduction or under an affiliation order or under a judgment as a co-respondent in a matrimonial cause); and the English Courts are therefore, of course, directed to accept a plea of an English bankruptcy, as an answer to any action or contract, wherever made or wherever to be performed, if the plaintiff's claim was a debt provable under this statute (*u*). By s. 30 all debts or liabilities arising

(*u*) Cf. *Ellis v. McHenry* (1871), 6 C. P. 228; *Callander, Sykes & Co. v. Colonial Secretary of Lagos, and Davies*, [1891] A. C. 460.

out of contract are so provable; so that the foreign creditor of an English bankrupt will lose his right of remedy in an English court unless he come in to prove his claim. Except, however, in the case of a contract made or to be performed in England, it is clear that a foreign Court could not be expected to recognise the English discharge (x), upon the principles already explained. The question, how far a particular contract is provable, may sometimes arise with reference to the provisions of the *lex loci contractus* as to its validity; but unless that law declare the contract to be void *ab initio* if certain conditions are not complied with (in which case there would be no contract at all), it is difficult to see how the decision can legitimately be taken away from the *lex fori*. In *Ex parte Melbourn, In re Melbourn* (1870), 6 Ch. 64, the bankrupt, who had been married in Batavia, had by an ante-nuptial contract settled a considerable sum of money on his wife for her separate use. By the law of Batavia no marriage contract excluding a community of goods has any effect as regards third parties until registered in the courts of that country. The contract in question had never been so registered; but it was nevertheless held that the wife of the bankrupt was entitled to prove against his estate for the sum settled. The ground of the decision was, of course, that the provision of the foreign law as to registration did not affect the validity of the contract, but only the remedy of those claiming under it; and that all questions of the priority of creditors must be determined by the law of the country where the bankruptcy takes place. If it had been held that the debt was not provable, it would of course have followed that the bankrupt's discharge had no effect upon it; and his after-acquired property would still have been subject to the claim. "The contention is," said Mellish, L.J., "that the effect of the Batavian law is this, that, although there is a contract between the husband and the wife, there is none as respects third parties. I have great difficulty in understanding that argument. It is admitted that, as between husband and wife, there is a debt and a binding contract. Then what is the meaning of saying it shall not be binding as between third parties, or it shall not affect third parties? Surely it only means that in an administration of the assets of the husband in bankruptcy this claim is to be postponed to the claim of all other parties?" The latter was, no doubt, the true construction of the Batavian law; and the provision, which thus assumed to

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Effect of
lex fori on
discharge.

(x) *Smith v. Buchanan* (1800), 1 East, 6; *Bartley v. Hodges*, 1 B. & S. 375; *Ellis v. McHenry* (1871), 6 C. P. 228; *Phillips v. Allan* (1828), 8 B. & C. 477; *Lewis v. Owen* (1821), 4 B. & Ald. 654; Story, *Conflict of Laws*, § 348.

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Discharge of
surety's
obligation.

govern the remedy alone, was rightly disregarded in an English court. Had the law of Batavia, on the other hand, provided that a contract entered into without certain prescribed formalities, should be void altogether, there can be no doubt that the English bankruptcy law would not have admitted its proof.

The release of a surety by alteration of the contract with the principal debtor furnishes another instance of the discharge of a contract otherwise than by performance, or by the indirect operation of rules of procedure. By analogy with the bankruptcy decision just cited, such a discharge by the law of the place where the surety entered into his obligation should be accepted in all countries alike. In cases where the surety's contract is to pay in a different country from that where he enters into his agreement some doubt may be felt; but inasmuch as the discharge by the action of the principals is neither a mode of performance nor a substitute for it, the law of the place where the contract was made seems the proper one to govern. The point is barren of authority, but it is quite clear that the *lex fori* can have nothing to do with the matter; and this inherent liability to discharge is in reality one of the incidents of the obligation which the *lex contractus* claims to decide. It has been already said that this *lex contractus* is selected by the intention of the parties, but that *prima facie* it will be the law of the place where the contract is entered into (*y*).

Sub-s. (4) of s. 28, however, provides that "an order of discharge shall not release any person who at the date of the receiving order was a partner or co-trustee with the bankrupt, or was jointly bound or had made any joint contract with him or any person who was a surety or in the nature of a surety for him" (*z*).

This principle, that the law which was originally intended to govern the nature of the obligation must decide what is and what is not a discharge, is applicable in strictness only to those discharges the liability to which was not necessarily foreseen as an

(*y*) The question of the liability of a surety, and its transmission to his heir, is one of the few subjects on which an indication is found in Roman law of private international law. "The heir of a *fide-promissor*," said Gaius, "is not bound by the contract of suretyship; unless the question of a foreign *fide-promissor* is under consideration, and the law of his State differs from ours on this point" (Gaius, III. 120; see *ibid.* III. 96). It may be, however, that Gaius contemplated the case of a contract made abroad, in the State to which all the parties belonged; and meant merely that in the event of the contract of suretyship coming before the *prætor peregrinus*, he would not adopt the Roman law simply as the *lex fori*. [See Phillipson, *Inter. Law and Custom*, vol. i. ch. xi. and xii.; and Bellot, *La théorie anglo-saxonne des conflits de lois*.]

(*z*) See *Ex parte Hallet*; *Re Moss*, [1905] 2 K. B. 307; *Ex parte Robson*; *Re FitzGeorge*, [1905] 1 K. B. 462.

incident of the contract, and which are not brought about by the will and choice of the parties themselves. A contract may, in a certain sense, be discharged by a *novation*; which is not a performance, but may be regarded as an agreed substitute for performance. There can be no doubt that a novation discharging the original obligation, and putting a new one in its place, if made according to the law of the place where performance was intended to take place, would be regarded as valid even in the courts of the original place of celebration. Nor can any good reason be assigned why equal effect should not be given to a release, extinguishment, or novation made in any other country in accordance with the *lex loci*; except the argument which claims respect for the inherent liability to discharge, or the inherent permanence of the original obligation. The inherent nature of the obligation ought, no doubt, to be strong enough to prevail against all incidents of law or fact except the will, expressed in action, of the contracting parties; but they are unquestionably competent to put an end to it whenever they please, and may reasonably suppose that an act or contract according to the forms of the place where they happen to be is the most effectual way of doing so. Accordingly, it is said by Lord Brougham in *Warrender v. Warrender* (1835), 9 Bligh, 89, combating the contention that a Scottish divorce was incompetent to dissolve the marriage in England of a domiciled Scotsman: "In what other contract of a nature merely personal—in what other transaction between men—is such a rule ever applied? such an arbitrary and gratuitous distinction made? such an exception raised to the universal position, that things are to be dissolved by the same process whereby they are bound together; or, rather, that the tie is to be loosened by reversing the operation which knit it, but reversing the operation according to the same rules? What gave force to the ligament? If a contract for sale of a chattel is made, or an obligation of debt is incurred, or a chattel is pledged in one country, the sale may be annulled, the debt released, and the pledge redeemed by the law and by the forms of another country in which the parties happen to reside, and in whose courts their rights and obligations come in question; unless there was an express stipulation in the contract itself against such avoidance, release, or redemption." The word "reside" is used in the passage just cited, but should not be taken as implying any necessity that the parties should be domiciled in the country where the avoidance, release, or redemption takes place. In the case before Lord Brougham, the question was as to the liability to dissolution of a marriage

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Discharge by
novation.

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contract, which differs essentially, as has been already pointed out (p. 378) from the commercial contracts of everyday life. Such instances as the release of a debt, the redemption of a pledge, or the annulling of a sale are themselves in the nature of contractual acts; and as to these the law of the domicile of the parties has nothing to do either with their capacity to act or the necessary forms and mode of acting.

APPENDIX (A) TO CHAPTER VIII.

YORK-ANTWERP RULES, 1924.

(Adopted at the Stockholm Conference of the International Law Association, 1924.)

Rule A.—There is a General Average Act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure.

Rule B.—General average sacrifices and expenses shall be borne by the different contributing interests on the basis hereinafter provided.

Rule C.—Only such damages, losses or expenses which are the direct consequence of the General Average Act shall be allowed as general average.

Damage or loss sustained by the ship or cargo through delay on the voyage, and indirect loss from the same cause, such as demurrage and loss of market, shall not be admitted as general average.

Rule D.—Rights to contribution in general average shall not be affected though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure; but this shall not prejudice any remedies which may be open against that party for such fault.

Rule E.—The onus of proof is upon the party claiming in general average to show that the loss or expense claimed is properly allowable as general average.

Rule F.—Any extra expense incurred in place of another expense which would have been allowable as general average, shall be deemed to be general average and so allowed, but only up to the amount of the general average expense avoided.

Rule G.—General average shall be adjusted as regards both loss and contribution upon the basis of values at the time and place when and where the adventure ends.

This rule shall not affect the determination of the place at which the average statement is to be made up.

Rule I.—Jettison of Cargo.

No jettison of cargo shall be made good as general average, unless such cargo is carried in accordance with the recognised custom of the trade.

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Rule II.—Damage by Jettison and Sacrifice for the Common Safety.

Damage done to a ship and cargo, or either of them, by or in consequence of a sacrifice made for the common safety, and by water which goes down a ship's hatches opened or other opening made for the purpose of making a jettison for the common safety, shall be made good as general average.

Rule III.—Extinguishing Fire on Shipboard.

Damage done to a ship and cargo, or either of them, by water or otherwise, including damage by beaching or scuttling a burning ship, in extinguishing a fire on board the ship, shall be made good as general average; except that no compensation shall be made for damage to such portions of the ship and bulk cargo, or to such separate packages of cargo, as have been on fire.

Rule IV.—Cutting away Wreck.

Loss or damage caused by cutting away the wreck or remains of spars, or of other things which have previously been carried away by sea-peril, shall not be made good as general average.

Rule V.—Voluntary Stranding.

When a ship is intentionally run on shore, and the circumstances are such that if that course were not adopted she would inevitably drive on shore or on rocks, no loss or damage caused to the ship, cargo and freight or any of them by such intentional running on shore shall be made good as general average. But in all other cases where a ship is intentionally run on shore for the common safety, the consequent loss or damage shall be allowed as general average.

Rule VI.—Carrying press of Sail—Damage to or loss of Sails.

Damage to or loss of sails and spars, or either of them, caused by forcing a ship off the ground or by driving her higher up the ground, for the common safety, shall be made good as general average; but where a ship is afloat, no loss or damage caused to the ship, cargo, and freight, or any of them, by carrying a press of sail, shall be made good as general average.

Rule VII.—Damage to Engines in refloating a Ship.

Damage caused to machinery and boilers of a ship which is ashore and in a position of peril, in endeavouring to refloat, shall be allowed in general average, when shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage; but where a ship is afloat no loss or damage caused by working the machinery and boilers shall be made good as general average.

Rule VIII.—Expenses Lightening a Ship when Ashore, and Consequent Damage.

When a ship is ashore and cargo and ship's fuel and stores or any of them are discharged as a General Average Act, the extra cost of lightening, lighter hire and re-shipping (if incurred) and the loss or damage sustained thereby shall be admitted as general average.

Rule IX.—Ship's Materials, and Stores Burnt for Fuel.

Ship's materials, and stores, or any of them, necessarily burnt for fuel for the common safety at a time of peril, shall be admitted as general average, when and only when an ample supply of fuel had been provided; but the estimated quantity of fuel that would have been consumed, calculated at the price current at the ship's last port of departure at the date of her leaving shall be credited to the general average.

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Rule X (a).—Expenses at Port of Refuge, &c.

When a ship shall have entered a port or place of refuge, or shall have returned to her port or place of loading, in consequence of accident, sacrifice, or other extraordinary circumstances, which render that necessary for the common safety, the expenses of entering such port or place shall be admitted as general average; and when she shall have sailed thence with her original cargo, or part of it, the corresponding expenses of leaving such port or place consequent upon such entry or return shall likewise be admitted as general average.

Rule X (b).—The cost of handling on board or discharging cargo, fuel or stores, whether at a port or place of loading, call or refuge, shall be admitted as general average when the handling or discharge was necessary for the common safety or to enable damage to the ship caused by sacrifice or accident to be repaired, if the repairs were necessary for the safe prosecution of the voyage.

Rule X (c).—Whenever the cost of handling or discharging cargo, fuel or stores is admissible as general average, the cost of reloading and stowing such cargo, fuel or stores on board the ship, together with all storage charges (including fire insurance, if incurred) on such cargo, fuel or stores shall likewise be so admitted. But when the ship is condemned or does not proceed on her original voyage, no storage expenses incurred after the date of the ship's condemnation or of the abandonment of the voyage shall be admitted as general average. In the event of the condemnation of the ship or the abandonment of the voyage before completion of discharge of cargo, storage expenses, as above, shall be admitted as general average up to the date of completion of discharge.

Rule X (d).—If a ship under average be in a port or place at which it is practicable to repair her, so as to enable her to carry on the whole cargo, and if, in order to save expenses, either she is towed thence to some other port or place of repair or to her destination, or the cargo or a portion of it is transhipped by another ship, or otherwise forwarded, then the extra cost of such towage, transhipment, and forwarding, or any of them (up to the amount of the extra expense saved) shall be payable by the several parties to the adventure in proportion to the extraordinary expense saved.

Rule XI.—Wages and Maintenance of Crew in Port of Refuge, &c.

When a ship shall have entered or been detained in any port or place under the circumstances, or for the purposes of repairs mentioned in Rule X, the wages payable to the Master, Officers and Crew together

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with the cost of maintenance of the same, during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage, shall be admitted as general average. But when the ship is condemned or does not proceed on her original voyage, the wages and maintenance of the Master, Officers, and Crew, incurred after the date of the ship's condemnation or of the abandonment of the voyage, shall not be admitted as general average.

In the event of the condemnation of the ship or the abandonment of the voyage before completion of discharge of cargo, wages and maintenance of crew, as above, shall be admitted as general average up to the date of completion of discharge.

Rule XII.—Damage to Cargo in Discharging, &c.

Damage to or loss of cargo, fuel or stores caused in the act of handling, discharging, storing, reloading and stowing shall be made good as general average, when and only when the cost of those measures respectively is admitted as general average.

Rule XIII.—Deductions from Cost of Repairs.

In adjusting claims for general average, repairs to be allowed in general average shall be subject to the following deductions in respect of "new for old," viz. :—

In the case of iron or steel ships, from date of original register to the date of accident :—

Up to 1 year old (A).	{	All repairs to be allowed in full, except painting or coating of bottom, from which one-third is to be deducted.
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Between 1 and 3 years (B).	{	One-third to be deducted off repairs to and renewals of Woodwork of Hull, Masts and Spars, Furniture, Upholstery, Crockery, Metal and Glassware, also Sails, Rigging, Ropes, Sheets and Hawsters (other than wire and chain), Awnings, Covers and Painting. One-sixth to be deducted off Wire Rigging, Wire Ropes and Wire Hawsters Wireless Apparatus, Chain Cables and Chains, Insulation, Donkey Engines, Steam Steering Gear and connections, Steam Winches and connections, Steam Cranes and connections and Electrical Machinery; other repairs in full.
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Between 3 and 6 years (C).	{	Deductions as above under Clause B, except that one-third be deducted off Insulation, and one-sixth be deducted off Ironwork of Masts and Spars, and all Machinery (inclusive of Boilers and their Mountings).
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Between 6 and 10 years (D).	{	Deductions as above under Clause C, except that one-third be deducted off Ironwork of Masts and Spars, Donkey Engines, Steam Steering Gear, Winches, Cranes and connections, repairs to and renewal of all Machinery (inclusive of Boilers and their Mountings), Wireless Apparatus and all Hawsters, Ropes, Sheets and Rigging.
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Between 10 and 15 years (E). { One-third to be deducted off all repairs and renewals except ironwork of hull and cementing and chain cables, from which one-sixth to be deducted. Anchors to be allowed in full.

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Over 15 years (F). { One-third to be deducted off all repairs and renewals. Anchors to be allowed in full. One-sixth to be deducted off chain cables.

Generally (G). { The deductions (except as to Provisions and Stores, Insulation, Wireless Apparatus, Machinery and Boilers) to be regulated by the age of the ship, and not the age of the particular part of her to which they apply. No painting bottom to be allowed if the bottom has not been painted within six months previous to the date of the accident. No deduction to be made in respect of old material which is repaired without being replaced by new, and Provisions, Stores and Gear which have not been in use.

In the case of wooden or composite ships:—

When a ship is under one year old from date of original register, at the time of accident, no deduction new for old shall be made. After that period a deduction of one-third shall be made, with the following exceptions:—

Anchors shall be allowed in full. Chain cables shall be subject to a deduction of one-sixth only.

No deduction shall be made in respect of provisions and stores which had not been in use.

Metal sheathing shall be dealt with, by allowing in full the cost of a weight equal to the gross weight of metal sheathing stripped off, minus the proceeds of the old metal. Nails, felt, and labour metalling are subject to a deduction of one-third.

When a ship is fitted with propelling, refrigerating, electrical, or other machinery, or with insulation, or with wireless apparatus, repairs to such machinery, insulation or wireless apparatus to be subject to the same deductions as in the case of iron or steel ships.

In the case of ships generally:—

In the case of all ships, the expense of straightening bent ironwork, including labour of taking out and replacing it, shall be allowed in full.

Graving dock dues, including expenses of removals, cartage, use of shears, stages, and graving dock materials, shall be allowed in full.

Rule XIV.—Temporary Repairs.

Where temporary repairs are effected to a ship at a port of loading, call or refuge, for the common safety, or for damage caused by general average sacrifice, the cost of such repairs shall be admitted as general average; but where temporary repairs of accidental damage are effected merely to enable the adventure to be completed, the cost of such repairs shall be admitted as general average only up to the

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saving in expense which would have been incurred and allowed in general average had such repairs not been effected there.

No deductions "new for old" shall be made from the cost of temporary repairs allowable as general average.

Rule XV.—Loss of Freight.

Loss of Freight arising from damage to or loss of cargo shall be made good as general average, either when caused by a General Average Act, or when the damage to or loss of cargo is so made good.

Deduction shall be made from the amount of gross freight lost of the charges which the owner thereof would have incurred to earn such freight, but has, in consequence of the sacrifice, not incurred.

Rule XVI.—Amount to be made good for Cargo Lost or Damaged by Sacrifice.

The amount to be made good as general average for damage to or loss of goods sacrificed shall be the loss which the owner of the goods has sustained thereby, based on the market values at the date of the arrival of the vessel or at the termination of the adventure where this ends at a place other than the original destination.

Where goods so damaged are sold after arrival, the loss to be made good in general average shall be calculated by applying to the sound value on the date of arrival of the vessel the percentage of loss resulting from a comparison of the proceeds with the sound value on date of sale.

Rule XVII.—Contributory Values.

The contribution to a general average shall be made upon the actual net values of the property at the termination of the adventure to which values shall be added the amount made good as general average for property sacrificed if not already included; deduction being made from the shipowner's freight and passage money at risk, of such charges and crew's wages as would not have been incurred in earning the freight had the ship and cargo been totally lost at the date of the General Average Act and have not been allowed as general average; deduction being also made from the value of the property of all charges incurred in respect thereof subsequently to the General Average Act, except such charges as are allowed in general average.

Passengers' luggage and personal effects not shipped under Bill of Lading shall not contribute in general average.

Rule XVIII.—Damage to Ship.

The amount to be allowed as general average for damage or loss to the ship, her machinery and/or gear when repaired or replaced shall be the actual reasonable cost of repairing or replacing such damage or loss, deductions being made as above (Rule XIII) when old material is replaced by new. When not repaired, the reasonable depreciation shall be allowed, not exceeding the estimated cost of repairs.

Where there is an actual or constructive total loss of the ship the amount to be allowed as general average for damage or loss to the ship caused by a General Average Act shall be the estimated sound value of the ship after deducting therefrom the estimated cost of repairing damage which is not general average and the proceeds of sale, if any.

Rule XIX.—Undeclared or Wrongfully Declared Cargo.

Damage or loss caused to goods loaded without the knowledge of the shipowner or his agent or to goods wilfully misdescribed at time of ship-

ment shall not be allowed as general average, but such goods shall remain liable to contribute, if saved.

Damage or loss caused to goods which have been wrongfully declared on shipment at a value which is lower than their real value shall be contributed for at the declared value, but such goods shall contribute upon their actual value.

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Rule XX.—Expenses Bearing up for Port, etc.

Fuel and stores consumed, and wages and maintenance of Master, Officers and Crew incurred, during the prolongation of the voyage occasioned by a ship entering a port or place of refuge or returning to her port or place of loading shall be admitted as general average when the expenses of entering such port or place are allowable in general average in accordance with Rule X (A).

Fuel and stores consumed during extra detention in a port or place of loading, call or refuge shall also be allowed in general average for the period during which wages and maintenance of Master, Officers and Crew are allowed in terms of Rule XI, except such fuel and stores as are consumed in effecting repairs not allowable in general average.

Rule XXI.—Provision of Funds.

A commission of 2 per cent. on general average disbursements shall be allowed in general average, but when the funds are not provided by any of the contributing interests, the necessary cost of obtaining the funds required by means of a bottomry bond or otherwise, or the loss sustained by owners of goods sold for the purpose, shall be allowed in general average.

The cost of insuring money advanced to pay for general average disbursements shall also be allowed in general average.

Rule XXII.—Interest on Losses Made Good in General Average.

Interest shall be allowed on expenditure, sacrifices and allowances charged to general average at the legal rate per annum prevailing at the final port of destination at which the adventure ends, or where there is no recognised legal rate, at the rate of 5 per cent. per annum, until the date of the general average statement, due allowance being made for any interim reimbursement from the contributory interests or from the general average deposit fund.

Rule XXIII.—Treatment of Cash Deposits.

Where cash deposits have been collected in respect of Cargo's liability for General Average, Salvage or Special Charges, such Deposits shall be paid into a special account, earning interest where possible, in the joint names of two Trustees (one to be nominated on behalf of the Shipowner and the other on behalf of the Depositors) in a Bank to be approved by such Trustees. The sum so deposited, together with accrued interest, if any, shall be held as security for and upon trust for payment to the parties entitled thereto of the General Average, Salvage or Special Charges payable by the cargo in respect of which the deposits have been collected. The Trustees shall have power to make payments on account or refunds of deposits which may be certified to in writing by the Average Adjuster. Such deposits and payments or refunds shall be without prejudice to the ultimate liability of the parties.

APPENDIX (B) TO CHAPTER VIII.

LONDON RULES OF AFFREIGHTMENT, 1893.

(Adopted at the London Conference of the International Law Association, 1893.)

1. The shipowner shall not be responsible for loss or damage arising from the act of God, perils of the sea, or other navigable waters, barratry of the master or crew, enemies, pirates, civil commotions, robbers, thieves, arrest or restraint of princes, rulers or people, riots, strikes, or stoppage of labour, capture or seizure or arrest under civil process; nor from fire on board, in hulk or craft or on shore, collisions, strandings, explosions, breakdown of machinery or tackle, or other accidents at sea, in other navigable waters, or in port, even when occasioned by negligence, default, or error in judgment of the pilot, master, crew or other servants of the shipowner; nor from heating, decay, putrefaction, rust, sweat, change of character, drainage, leakage, breakage, or any loss or damage arising from the nature of the goods, or the insufficiency of packages, or vermin; nor for land damage; nor for the obliteration, errors, insufficiency, or absence of marks, numbers, address, or description; nor for risk of hulk, craft, or transhipment.

2. The shipowner shall be responsible for loss or damage arising from any unfit state of the vessel to receive the goods, or any unseaworthiness of the vessel when she sails on the voyage. But any latent defect in hull, machinery, equipment, or fittings, shall not be considered unfitness or unseaworthiness, provided the same do not result from want of due diligence of the shipowner, or of the ship's husband or manager.

3. The shipowner shall be responsible for loss or damage arising from want of reasonable care and skill in the loading, stowage, or discharge of the goods. Shipowners' responsibility to cease on delivery from the ship's tackle.

4. The ship to be at liberty to call at any port in order, to sail without pilots, and to tow and assist vessels in distress, and to deviate for the purpose of saving life or property.

5. General average payable according to York-Antwerp rules.

APPENDIX (C) TO CHAPTER VIII.

(14 & 15 GEO. 5, c. 22.)

CARRIAGE OF GOODS BY SEA ACT, 1924.

An Act to amend the law with respect to the carriage of goods by sea.
[1st August, 1924.]

Whereas at the International Conference on Maritime Law held at Brussels in October, 1922, the delegates at the Conference, including the delegates representing His Majesty, agreed unanimously to recommend their respective Governments to adopt as the basis of a convention a draft convention for the unification of certain rules relating to bills of lading:

And whereas at a meeting held at Brussels in October, 1923, the rules contained in the said draft convention were amended by the Committee appointed by the said Conference:

And whereas it is expedient that the said rules as so amended and as set out with modifications in the Schedule to this Act (in this Act referred to as "the Rules") should, subject to the provisions of this Act, be given the force of law with a view to establishing the responsibilities, liabilities, rights and immunities attaching to carriers under bills of lading:

Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. Subject to the provisions of this Act, the Rules shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in Great Britain or Northern Ireland to any other port whether in or outside Great Britain or Northern Ireland.

Application of Rules in Schedule.

2. There shall not be implied in any contract for the carriage of goods by sea to which the Rules apply any absolute undertaking by the carrier of the goods to provide a seaworthy ship.

Absolute warranty of seaworthiness not to be implied in contracts to which Rules apply.

3. Every bill of lading, or similar document of title, issued in Great Britain or Northern Ireland which contains or is evidence of any contract to which the Rules apply shall contain an express statement that it is to have effect subject to the provisions of the said Rules as applied by this Act.

Statement as to application of Rules to be included in bills of lading.

4. Article VI. of the Rules shall, in relation to the carriage of goods by sea in ships carrying goods from any port in Great Britain or Northern Ireland to any other port in Great Britain or Northern Ireland or to a port in the Irish Free State, have effect as though the said Article referred to goods of any class instead of to particular goods and as though the proviso to the second paragraph of the said Article were omitted.

Modification of Article VI. of Rules in relation to

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coasting
trade.
Modification
of Rules 4
and 5 of
Article III.
in relation to
bulk cargoes.
Short title,
saving, and
operation.
57 & 58 Vict.
c. 60.

5. Where under the custom of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in the Rules, the bill of lading shall not be deemed to be *prima facie* evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper.

6.—(1) This Act may be cited as the Carriage of Goods by Sea Act, 1924.

(2) Nothing in this Act shall affect the operation of sections four hundred and forty-six to four hundred and fifty, both inclusive, five hundred and two, and five hundred and three of the Merchant Shipping Act, 1894, as amended by any subsequent enactment, or the operation of any other enactment for the time being in force limiting the liability of the owners of seagoing vessels.

(3) The Rules shall not by virtue of this Act apply to any contract for the carriage of goods by sea made before such day, not being earlier than the thirtieth day of June, nineteen hundred and twenty-four, as His Majesty may by Order in Council direct, nor to any bill of lading or similar document of title issued, whether before or after such day as aforesaid, in pursuance of any such contract as aforesaid.

SCHEDULE.

RULES RELATING TO BILLS OF LADING.

ARTICLE I.

DEFINITIONS.

In these rules the following expressions have the meanings hereby assigned to them respectively, that is to say—

- (a) "Carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper:
- (b) "Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charterparty from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same:
- (c) "Goods" includes goods, wares, merchandises, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried:
- (d) "Ship" means any vessel used for the carriage of goods by sea:
- (e) "Carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

ARTICLE II.

RISKS.

Subject to the provisions of Article VI., under every contract of carriage of goods by sea the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth.

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ARTICLE III.

RESPONSIBILITIES AND LIABILITIES.

1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

- (a) Make the ship seaworthy :
- (b) Properly man, equip, and supply the ship :
- (c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

2. Subject to the provisions of Article IV., the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

3. After receiving the goods into his charge, the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

- (a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage ;
- (b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper ;
- (c) The apparent order and condition of the goods :

Provided that no carrier, master or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

4. Such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b), and (c).

5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into

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the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

7. After the goods are loaded the bill of lading to be issued by the carrier, master or agent of the carrier, to the shipper shall, if the shipper so demands, be a "shipped" bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this Article be deemed to constitute a "shipped" bill of lading.

8. Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.

A benefit of insurance or similar clause shall be deemed to be a clause relieving the carrier from liability.

ARTICLE IV.

RIGHTS AND IMMUNITIES.

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.

Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship:

(b) Fire, unless caused by the actual fault or privity of the carrier:

- (c) Perils, dangers and accidents of the sea or other navigable waters :
- (d) Act of God :
- (e) Act of war :
- (f) Act of public enemies :
- (g) Arrest or restraint of princes, rulers or people, or seizure under legal process :
- (h) Quarantine restrictions :
- (i) Act or omission of the shipper or owner of the goods, his agent or representative :
- (j) Strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general :
- (k) Riots and civil commotions :
- (l) Saving or attempting to save life or property at sea :
- (m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods :
- (n) Insufficiency of packing :
- (o) Insufficiency or inadequacy of marks :
- (p) Latent defects not discoverable by due diligence :
- (q) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

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3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.

4. Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding £100 per package or unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

This declaration if embodied in the bill of lading shall be *prima facie* evidence, but shall not be binding or conclusive on the carrier.

By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading.

6. Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented, with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.

If any such goods shipped with such knowledge and consent shall

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become a danger to the ship or cargo, they may in like manner be landed at any place or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

ARTICLE V.

SURRENDER OF RIGHTS AND IMMUNITIES, AND INCREASE OF RESPONSIBILITIES AND LIABILITIES.

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under the Rules contained in any of these Articles, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of these Rules shall not be applicable to charterparties, but if bills of lading are issued in the case of a ship under a charterparty they shall comply with the terms of these Rules. Nothing in these Rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

ARTICLE VI

SPECIAL CONDITIONS.

Notwithstanding the provisions of the preceding Articles, a carrier, master or agent of the carrier, and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect:

Provided that this article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed, are such as reasonably to justify a special agreement.

ARTICLE VII.

LIMITATIONS ON THE APPLICATION OF THE RULES.

Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

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LIMITATION OF LIABILITY.

CAP. VIII.

The provisions of these Rules shall not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of the liability of owners of sea-going vessels.

ARTICLE IX.

The monetary units mentioned in these Rules are to be taken to be gold value.

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APPENDIX (D) TO CHAPTER VIII.

THE COMMONWEALTH OF AUSTRALIA.

SEA-CARRIAGE OF GOODS ACT.

No. 22 of 1924.

An Act relating to the Sea-Carriage of Goods.

[Assented to 17th September, 1924.]

Be it enacted by the King's Most Excellent Majesty, the Senate, and the House of Representatives of the Commonwealth of Australia, as follows:—

Short title.
Commence-
ment.

1. This Act may be cited as the *Sea-Carriage of Goods Act* 1924.

2. This Act shall commence on a date to be fixed by Proclamation.

Repeal.

3. The *Sea-Carriage of Goods Act* 1904 is hereby repealed.

Application
of Rules in
Schedule.

4.—(1) Subject to the provisions of this Act, the Rules contained in the Schedule to this Act (in this Act referred to as "the Rules") shall have effect in relation to and in connexion with the carriage of goods by sea in ships carrying goods from any port in the Commonwealth to any other port whether in or outside the Commonwealth.

(2) The Rules shall not by virtue of this Act apply to the carriage of goods by sea from a port in any State to any other port in the same State.

Absolute
warranty of
seaworthi-
ness not
implied.

5. There shall not be implied in any contract for the carriage of goods by sea to which this Act applies any absolute undertaking by the carrier of the goods to provide a seaworthy ship.

Provisions as
to bills of
lading.

6. Every bill of lading or similar document of title issued in the Commonwealth which contains or is evidence of any contract to which the Rules apply shall contain an express statement that it is to have effect subject to the provisions of the Rules as applied by this Act.

Received-for-
shipment
bills of
lading.

7. A bill of lading issued in accordance with paragraph 3 of Article III. of the Rules shall for all purposes be deemed to be a valid bill of lading with the like effect, and capable of negotiation in all respects and with the like consequences, as if it were a shipped bill of lading.

Bulk cargoes.

8. Where, under the custom of any trade, the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper, and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in the Rules, the bill of lading shall not be deemed to be *prima facie* evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper.

Construc-
tion and
jurisdiction.

9.—(1) All parties to any bill of lading or document relating to the carriage of goods from any place in Australia to any place outside Australia shall be deemed to have intended to contract according to the laws in force at the place of shipment, and any stipulation or agreement

to the contrary, or purporting to oust or lessen the jurisdiction of the Courts of the Commonwealth or of a State in respect of the bill of lading or document, shall be illegal, null and void, and of no effect.

(2) Any stipulation or agreement, whether made in the Commonwealth or elsewhere, purporting to oust or lessen the jurisdiction of the Courts of the Commonwealth or of a State in respect of any bill of lading or document relating to the carriage of goods from any place outside Australia to any place in Australia shall be illegal, null and void, and of no effect.

10.—(1) Nothing in this Act shall affect the operation of Division 10 of Part IV. of the *Navigation Act* 1912-1920 or the operation of any other Act for the time being in force limiting the liability of the owners of sea-going vessels. Saving.

(2) The Rules shall not by virtue of this Act apply to any contract for the carriage of goods by sea made before the commencement of this Act.

THE SCHEDULE.

(This corresponds to the Schedule in the British Act, *supra*.)

Reference may be made to the case of *Tudor Accumulator Co., Ltd. v. Oceanic Steam Navigation Co., Ltd.* (1924), 41 T. L. R. 81, where a bill of lading was expressed to be subject to the provisions of Sea-Carriage of Goods Act, 1904 (Australian Statute), ss. 4 (1), 5, and 8 (2). S. 4 (1) is re-enacted in s. 4 (1) of the Act of 1924. It was held by Rowlatt, J., that the Australian Act did not apply.

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APPENDIX (E) TO CHAPTER VIII.

GLASGOW MARINE INSURANCE RULES, 1901.

(Adopted at the Glasgow Conference of the International Law Association, 1901.)

I.—TOTAL LOSS.

Actual total
loss.

1. An insurance against total loss includes a constructive as well as an actual total loss unless a different intention is shown in the policy.

2. Where by a peril insured against an insured subject is destroyed, or so damaged as to cease to be a thing of the kind insured, there is an actual total loss.

3. Where by a peril insured against the owner of an insured subject has been wholly deprived of it, and either there is no reasonable prospect of recovering it, or it can only be recovered on paying charges upon it exceeding the recovered value, for which the assured is not otherwise liable, there is an actual total loss, although the subject may still exist.

Constructive
total loss.

4. Where by a peril insured against the owner of an insured subject is deprived of the possession or of the control and use of it indefinitely, there is a constructive total loss of the subject.

Ship.

5. Where by a peril insured against a ship is so damaged or so placed that the cost of recovering and repairing her would exceed three-fourths of her sound value before the disaster, there is a constructive total loss of the ship.

(a) The cost of recovery and repair is to be estimated with reference to the circumstances at the time to which the estimate relates (a); including the cost of prudent temporary repairs and removal to a port of repair, and also any necessary expenses of obtaining money, but not including wages or provisions for the ship's crew at the port of repair.

(b) In making the comparison no deduction is to be made from the cost of repairs in respect of new for old, or in respect of general average contributions which have become payable by other interests towards the cost of repairs; but deduction is to be made of contributions which would be payable by other interests to expenses or sacrifices to be incurred or made after the time to which the estimate relates (a).

(c) Where the ship has been valued in the policy that value shall be deemed to be her sound value unless otherwise expressly agreed in the policy.

Cargo.

6. In the following cases there is a constructive total loss of cargo:

(1) Where owing to perils insured against goods are left at a port short of their destination because they cannot be carried forward; or

(a) See Rule 7.

because if carried forward they would not arrive at the destination merchantable as things of the kind insured.

(2) Where by perils insured against the goods are lost or damaged to the extent of three-fourths of their insurable value.

(3) Where by perils insured against the carrying ship is an actual or constructive total loss, and the goods are not forwarded under the original contract of carriage, and they can only be brought to their destination by incurring expenses which would exceed three-fourths of their gross value on arrival less the expenses of selling.

The estimate of expenses is to include all expenses of recovering and preserving the goods and all forwarding freight which would be incurred after the time to which the estimate relates (b), but not any salvage or other expenses, or general average contributions, incurred in respect of the goods before that time.

7. Where notice of abandonment has been given to the insurer, as hereinafter required, the estimate of whether the insured subject was a constructive total loss is to be made as at the date of giving that notice. Where notice of abandonment has become unnecessary the estimate is to be made as at the date of the sale or other event which made it unnecessary.

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Time for
estimating
constructive
total loss.

NOTICE OF ABANDONMENT.

8. The assured cannot abandon and claim as for a total loss, unless the insured subject has become an actual or constructive total loss.

9. Where there is a constructive total loss of an insured subject, the assured is entitled to claim payment of the full amount insured if he has duly given notice that he abandons to the insurer the interest in the subject insured by him. Failing such notice, the assured can only claim as for a partial loss, except in the cases mentioned in Rule 10.

(a) The notice must be given to the insurer with reasonable diligence after receipt by the assured of information of the loss; allowing time for inquiry where the information is doubtful.

(b) The notice may be given in any manner, but must indicate the intention of the assured to abandon the insured interest in the subject insured unconditionally.

10. Where the interest of the assured in the insured subject has been justifiably sold before he has had full opportunity of abandoning it to the insurer, and generally where no benefit could arise to the insurer if notice of abandonment were given to him, such notice is not necessary, and the assured may claim payment in full without it.

Where notice
not neces-
sary.

Also notice of abandonment is not necessary from an insurer to a re-insurer.

11. Neither the right to abandon and claim payment in full nor the right to refuse to accept abandonment is prejudiced by efforts made by the assured or insurer to save or diminish the loss of the thing insured.

EFFECT OF ABANDONMENT.

12. Where abandonment of the subject insured has been accepted, or where there is an actual or constructive total loss, the insurer becomes entitled on payment of the full amount insured to his rateable proportion of all that remains of the assured's interest in the subject insured, as from the time of the casualty which caused the loss; and

(b) See Rule 7.

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Freight
earned after
abandon-
ment.

also to be subrogated in like proportion to all the rights and remedies of the assured in respect of that interest or the loss thereof.

13. Where freight is earned by the ship by continuing a voyage after becoming transferred to the insurer of ship as aforesaid, the freight so earned is to be apportioned between the assured and the insurer of ship, in proportion to the distances run by the ship in earning that freight before and after the casualty.

If part of the freight for the voyage has been received in advance, only so much of the freight earned by continuing the voyage will belong to the assured, as, having regard to the freight received in advance, will give him his *pro rata* share of the whole.

EFFECT UPON FREIGHT INSURANCES.

14. For the purposes of an insurance of freight, any freight apportioned to an insurer of ship under the circumstances stated in Rule 13 is to be deemed to be lost.

15. Where freight for a voyage is insured generally, there is a total loss of freight if by perils insured against the cargo has become an actual or constructive total loss, and no goods bearing freight can be profitably substituted and carried to the destination.

Where specific or chartered freight is insured, there is a total loss if, having regard to the freight contract, no part of that freight can be earned.

In either case, there is a total loss of freight if the ship has by perils insured against become an actual or constructive total loss, and no part of the cargo can be forwarded to the destination except at an expense to the shipowner which would exceed the freight there payable. The expense to be estimated for this purpose shall include all expenses of forwarding the goods which would have to be incurred by the shipowner as from the time when the voyage of his ship was given up.

But if in any case *pro rata* freight has become payable the loss of freight is not total.

II.—PARTIAL LOSS OF SHIPS: DEDUCTIONS.

16. The deductions from the cost of repairs in respect of new for old, for ascertaining the amount of a partial loss of ship, shall be those allowed by Rule XIII. of the York-Antwerp Rules of General Average.

III.—EFFECT OF UNSEAWORTHINESS, &C.

Wilful acts.

17. An insurer is not liable for loss or damage brought about by the wilful act of the assured himself, even though the proximate cause may have been a peril insured against.

Inherent
vice.

18. An insurer is not liable for loss or damage caused proximately by any inherent vice, weakness or nature, or unsoundness in condition, of the subject insured, or of the thing on which the safety of the subject insured depends.

Warranty of
seaworthi-
ness.

19. Upon any insurance for a voyage of a ship or of any interest dependent upon the ship, the assured warrants as follows:

- (1) That where the insurance first attaches in port all reasonable care has been taken to make the ship then in a fit condition to lie there.
- (2) That all reasonable care will be taken to make the ship fit and properly manned, equipped, and documented for her voyage.

Provided that where the voyage includes more than one stage, it will suffice that reasonable care be taken to make the ship fit and properly manned, equipped, and documented at the beginning of each stage for that stage.

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In case of any breach of this warranty the insurer is not liable for any loss or damage consequent thereon, although proximately caused by a peril insured against. But the insurance is not conditional on performance of the warranty, and is not affected by a breach thereof, except as above stated; and except as above provided, there is not any warranty of the fitness of the ship by the assured.

In a policy on cargo there is no implied warranty as to the seaworthiness of the ship.

IV.—DOUBLE INSURANCES.

20. Where an interest is insured against the same risk for the same assured by two or more insurances for amounts which together exceed the agreed or insurable value of that interest, there is a double insurance. The insured may in such a case recover in respect of a loss under any of the policies covering it, in any order, unless he has already received indemnity for the loss as estimated upon the valuation in that policy.

21. Where in a case of double insurance one or more of the insurers have duly paid a loss, they are entitled to contributions thereto from the insurers on the other policies which cover the loss, so that the amount paid shall be distributed over the whole, as follows:

Contribution.

- (a) Where the policies are unvalued or agree in their valuations, the contribution is to be in proportion to the amounts insured;
- (b) Where the valuations in the policies differ, then:
 - (1) In case of partial loss, the contribution is to be in proportion to the liabilities under the several policies in respect of that loss;
 - (2) In case of total loss, so much of the amount paid under any policy as is ascribable to the part of the valuation therein which is covered by other policies, is to be contributed to by those policies in proportion to their liabilities in respect thereof.

22. The assured cannot claim any return of premium in cases of double insurance where the risk has attached. Premium.

CHAPTER IX.

TORTS.

Torts—
 Jurisdiction.

THE question of the proper law applicable to an action based upon a tort committed abroad, and of the proper *forum* in which that law should be applied, has not arisen so frequently as the corresponding doubt with respect to contracts, but has nevertheless been the subject of late years of careful judicial consideration. It may be conveniently considered under three heads :—(i.) Jurisdiction with respect to torts, (ii.) the measure of the wrong done, (iii.) the measure of the remedy.

(i.) JURISDICTION WITH RESPECT TO TORTS.

Torts to
 foreign land.

The formal distinction between local and transitory actions, arising from the old rules as to venue, has been already sufficiently considered (p. 358); and it need only be remarked that it operated upon actions based on tort in exactly the same way as upon actions based on contracts. Thus an action for a trespass or other tort to foreign land was formerly excluded from the English courts, not on any principle of private international law, but ostensibly on the technical ground that it was absolutely necessary, for purposes of procedure, that the locality of the alleged grievance should be a country within English jurisdiction, where the action in question could be tried according to English law. This was first definitely held in *Skinner v. East India Company* (1665), 1 Cowp. 167; but the soundness of the rule was subsequently questioned by Lord Mansfield in *Mostyn v. Fabrigas* (1774), 1 Cowp. 161, who made a distinction between actions which concerned the title to or possession of foreign immovables, and actions for personal damages for torts to those immovables. The full effect of the existing rules as to venue was not recognised in this expression of opinion, which was distinctly over-ruled in *Doulson v. Matthews* (1792), 4 T. R. 503. The last-mentioned case re-established the strict rule which prohibited the bringing of such an action in an English court, but on the technical ground of the rules as to venue only.

Abolition of
 rules of
 venue.

The abolition by the Judicature Act (a) of the rules as to local venue had the effect of re-opening the question. In *The M.*

(a) 38 & 39 Vict. c. 77; Order xxxvi. r. 1.

Moxxham (1875), 1 P. D. 107, the first case decided after this alteration in the law, the litigants had by agreement waived any objection to the jurisdiction of the Court which might otherwise have been taken, or the point would have directly arisen. The action was brought by an English company, who owned a pier in Spain, against an English shipowner for damage done to the pier by the vessel coming into collision with it. The pier was, of course, an integral portion of Spanish soil; and after laying down the general rule, that no action can be maintained in England for a wrongful act, unless it is wrongful both by English law and by the law of the place where it was committed, Mellish, L.J., proceeded as follows: "Whether the rule as to wrongful acts to immovable property in a foreign country does not go still further, and prevent an action from being brought at all, is a question which it is not necessary to determine in this case; because, having regard to the consent of the parties and the agreement that has been come to, no objection to the jurisdiction could be taken." So it was said by James, L.J., in the same case, that had it not been for the agreement of the parties, very grave difficulties might have arisen as to the jurisdiction of the Court to entertain any action or proceedings whatever with respect to injuries done to foreign soil. The question in the most direct form was, however, raised in *British South Africa Company v. Companhia de Moçambique*, [1893] A. C. 602, when it was definitely decided by the House of Lords that no action was maintainable in this country for a tort to foreign land, and that, although the domicile of the defendant company was English, and it was alleged that no competent tribunal existed in the *situs*. The distinction drawn by Lord Mansfield in *Mostyn v. Fabrigas* was rejected. The then existing authorities are so fully examined in the judgments that it is unnecessary to repeat them here. It is now conclusively settled that the English Courts will decline to entertain an action for injury to foreign immovables, not upon any technical rule peculiar to this country, but upon the ground of the absence of the jurisdiction. The same rule seems to be accepted in the jurisprudence of the United States (b).

The question of the jurisdiction of English Courts to try actions based on torts to foreign immovables, formerly regarded as depending upon the history of the law as to venue (c), has thus been now placed upon broader principles. Personal torts, which were transitory and not local in their nature, were of course not affected by the old restriction. There was at one time, however,

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Torts—
Jurisdiction.Abolition
of rule of
venue.Personal
torts.

(b) Story, Conflict of Laws, §§ 551-554. See *supra*, pp. 232, 236.

(c) For the history of English law as to locality of actions, see 1 Smith, Leading Cases (1903), pp. 615 *seq.*

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Torts—
Jurisdiction.The King's
peace.

another cause which might be regarded as limiting the jurisdiction with respect to certain personal trespasses, as assault. In the form of declaration for assault which was in use before the Common Law Procedure Act, 1852, the assault was required to be laid and proved *contra pacem regis*; a condition which of course could not be strictly complied with if it had taken place without the jurisdiction; and Lord Mansfield, in *Mostyn v. Fabrigas*, expressed a doubt whether this would not exclude the competency of the English Courts to try such cases at all. So far as this doubt was a technical one, based on the necessities of English procedure, it has of course been removed; nor does it in fact seem to have had any foundation in international principles. "The right of all persons," said Selwyn, L.J., "whether British subjects or aliens, to sue in the English courts for damages in respect of torts committed in foreign countries, has long since been established, and . . . there seems to be no reason why aliens should not sue in England for personal injuries done to them by other aliens abroad, when such injuries are actionable both by the law of England and also by that of the country where they are committed; and the impression which had prevailed to the contrary seems to be erroneous" (d). Deferring for the present the subject of the measure of the wrong done, or of the remedy available, the question of jurisdiction seems to be put beyond all reasonable doubt; and it may therefore be assumed that an English Court has a right to entertain all actions for personal wrongs, wherever and by whomsoever committed (e), without any breach either of the comity of nations or the technical requirements of English law.

The act complained of, however, must be actionable by English law, and wrongful (or not justifiable) by the law of the place where it was committed (f). It need not, according to *Machado v. Fontes*, be actionable by the law of the place where it was committed; but it must be an act which would not be authorised, justified, or excused there (g). It is true that Selwyn,

(d) *The Halley* (1867), 2 P. C. 193, 202; *The Amalia* (1863), 1 Moo. P. C. (N.S.) 484.

(e) Except, of course, torts done, authorised, or sanctioned by a sovereign Power: *Buron v. Denman* (1848), 2 Ex. 167. Cf. *Walker v. Baird*, [1892] A. C. 471; *Poll v. Lord-Advocate*, [1899] 1 F. (Ct. of Sess.) 823. See also *supra*, p. 204.

(f) *Carr v. Francis Times & Co.*, [1902] A. C. 176. *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1, 28. *Machado v. Fontes*, [1897] 2 Q. B. 231. See also *Skinner v. East India Co.* (1665), 1 Cowp. 167 (a case involving trespass to the person); *Blad's Case* (1673), 3 Swan. 603 (trespass to goods and trover); *Mostyn v. Fabrigas* (1774), *supra* (false imprisonment); *Scott v. Seymour* (1862), 1 H. & C. 219 (assault). Cf. also *Evans & Sons v. Stein & Co.*, [1904] 7 F. (Ct. of Sess.) 65; "*Morocco Bound*" *Syndicate v. Harris*, [1895] 1 Ch. 535.

(g) Cf. also *Scott v. Seymour* (1862), 1 H. & C. 219.

L.J. (in *The Halley*), uses the word "actionable" with regard to both laws; but this point was not material to the case before him, and, in any event, the decision of the Court of Appeal in *Machado v. Fontes* puts the matter beyond doubt. It would seem logically to follow, that any defence to an action for tort, if good in the country where the tort was committed, would be good also in the courts of any other country. (*Infra*, p. 517.)

In *Canadian Pacific Ry. Co. v. Parent*, [1917] A. C. 195, the respondent, the widow of Joseph Chalifour, who was domiciled in Quebec, and who was killed while travelling through Ontario, sued the appellants in Quebec to recover damages occasioned by his death owing to the negligence of the appellants. By the terms of the ticket issued to Chalifour and signed by him the appellant company was exempt from all liability for negligence. Negligence was admitted, and it was also admitted that if the accident had occurred in Quebec the widow would have been entitled to maintain an action, although her husband would have been precluded by his contract from suing for injuries. But the appellants contended that their liability was governed by the law of Ontario, where the accident occurred, and that by the Fatal Accidents Act (1 Geo. 5, c. 33) of Ontario, the respondent had no right of action, since if Chalifour had survived he would have had none under the terms under which he was carried. Accepting these contentions, Lord Haldane said that "on the general principles which applied in Canada and this country under the title of private international law, a common law action for damages for tort could not be successfully maintained against the appellants in Quebec. It was not necessary to consider whether all the language used by the English Court of Appeal in the judgments in *Machado v. Fontes* was sufficiently precise. The conclusion there reached was that it was not necessary, if the act was wrongful in the country where the action was brought, that it should be susceptible of civil proceedings in the other country, provided it is not an innocent act there. This question does not arise in the present case, where the action was brought not against the servants of the appellants, but against the appellants themselves. It is clear that the appellants cannot be said to have committed in a corporate capacity any criminal act. The most that can be suggested is that, on the maxim *respondeat superior*, they might have been civilly responsible for the acts of their servants." It was therefore held that upon the principles of private international law the appellants were under no common law liability in Quebec, since they were neither civilly nor criminally liable in Ontario.

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Torts—
Jurisdiction.

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Torts—
Jurisdiction.Torts com-
mitted on the
high sea.

With respect to the high seas, it would appear that, originally and independently of statute, the English Court of Admiralty exercised jurisdiction over all torts on the high seas (*h*). And for the purposes of jurisdiction, it would seem that there is no distinction between the high seas and other waters or harbours “where great ships lie and hover” (*i*), though the last class of cases seems confined to wrongs (whether viewed as crimes or torts) committed on board British ships, regarded as “floating islands.”

The Fatal Accidents Acts, 1846 to 1908 (9 & 10 Vict. c. 93; 27 & 28 Vict. c. 95; and 8 Edw. 7, c. 7) apply for the benefit of the representatives of a foreigner whose death was brought about by the negligence of the defendants or their servants upon the high seas, at all events if the defendants are British subjects (*k*), and perhaps also if they are not (*l*). But the Admiralty Court (now the Probate, Divorce, and Admiralty Division) has not jurisdiction to entertain an action *in rem* for damages for loss of life under Lord Campbell's Act (9 & 10 Vict. c. 93), that jurisdiction not being transferred to the Court by 24 Vict. c. 10 (*m*).

Service out
of the juris-
diction—
when
allowed.

It has been already shown, when dealing with contracts, that the question of service out of the jurisdiction is entirely regulated by Order XI. r. 1, of the Supreme Court Rules, which is intended by the Legislature as a complete code on the subject (*n*).

In actions for tort, the only jurisdiction to order service of writ or notice of writ abroad is in cases falling within Order XI. (R.S.C.) 1 (*a*), (*c*), (*ee*), (*f*), (*g*) (*o*). These sub-clauses are as follows :

(*h*) *The Volant* (1842), 1 W. Rob. 383; *The Lagan or Mimax* (1838), 3 Hagg. Adm. 418; *The Hercules* (1819), 2 Dod. 353; *The Ruckers* (1801), 4 C. Rob. 73; *De Lovio v. Boit* (1815), 2 Gallison, 398 (Am.). In the last-cited case it was said by Story, J., that the English Court of Admiralty had jurisdiction over all torts committed on the high seas, and in harbours within the ebb and flow of the tide, quoting the Black Book (*temp. circa* Edward III.).

(*i*) *Reg. v. Carr* (1882), 10 Q. B. D. 76; *Reg. v. Anderson* (1868), 1 C. C. R. 161; *Reg. v. Allen* (1872), 1 Moo. C. C. 494; *Reg. v. Jemot*, cited in *Reg. v. Anderson*, p. 168.

(*k*) *Davidsson v. Hill*, [1901] 2 K. B. 606, per Kennedy and Phillimore, JJ., dissenting from the contrary view taken by Darling, J., in *Adam v. British and Foreign Steamship Co.*, [1898] 2 Q. B. 430, and agreeing with Sir R. Phillimore in *The Explorer* (1870), L. R. 3 A. & E. 289. This was followed in a Scotch case, *Convery v. Lanarkshire Tramways Co.* (1905), 8 Sess. Cas., 5th series, on the ground that if a claim is recognised by the *lex fori* as well as by the *lex loci delicti commissi*, it is immaterial that it is not recognised by the personal law of the plaintiff.

(*l*) *Davidsson v. Hill*, [1901] 2 K. B. 606, at p. 615, per Kennedy, J., citing *Mills v. Armstrong, The Bernina* (1888), 13 App. Cas. 1. Cf. also *Kendrick v. Burnett* (1897), 35 Sc. L. R. 62. See, further, *infra*, p. 522.

(*m*) *The Vera Cruz* (2) (1884), 9 P. D. 96; 10 App. Cas. 59, over-ruling *The Franconia* (1877), 2 P. D. 163, C. A.

(*n*) *Re Eager* (1883), 22 Ch. D. 87.

(*o*) *Lenders v. Anderson* (1883), 12 Q. B. D. 50; *Field v. Bennett* (1886), 1 T. L. R. 374; 56 L. J. Q. B. 89; *Croft v. King*, [1893] 1 Q. B. 419; *Williams v. Cartwright*, [1895] 1 Q. B. 419. It is insufficient that damages

1. Service out of the jurisdiction of a writ of summons, or notice (p) of a writ of summons, may be allowed by the Court or a judge, whenever—

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Torts—
—

- (a) The whole subject-matter of the action is land, situate within the jurisdiction (with or without rents or profits); or the perpetuation of testimony relating to land within the jurisdiction; or
- (c) Any relief is sought against any person domiciled or ordinarily resident within the jurisdiction; or
- (ee) The action is founded on a tort committed within the jurisdiction; or
- (f) Any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof; or
- (g) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.

Sub-rule (ee) restores the power formerly existing to allow service out of the jurisdiction in an action of tort, which was taken away by the R. S. C., except in so far as such power was involved in sub-rules (a), (c), (f), and (g).

Under (f) leave for service abroad has been granted where an injunction was sought to restrain the defendant from publishing a libel within the jurisdiction (q).

Under (g) the test appears to be whether the action would reasonably and properly have been brought against the defendants jointly at the time the writ was issued; and not whether there is in fact a good cause of action against both (r).

(ii.) MEASURE OF THE WRONG DONE.

The English Court, having jurisdiction to entertain in the first instance any claim in respect of an alleged foreign tort, has next to ascertain whether the act complained of was in fact unlawful. By what law is it to be guided in so doing?—the law of the country where the act was committed, or that of England, where the remedy is sought? The answer to this has already indirectly

Nature.

have been sustained within the jurisdiction (*Shearman v. Findlay* (1883), 32 W. R. 122).

(p) By Order xi. r. 6, notice of the writ can be served when the defendant is neither a British subject nor in British dominions: see *Fowler v. Barstow* (1881), 20 Ch. D. 240; *Western, etc., Bank of New York v. Perez*, [1891] 1 Q. B. 304, and *Carrick v. Hancock* (1895), 12 T. L. R. 59.

(q) *Tozier v. Hawkins* (1885), 15 Q. B. D. 680. Cf. *Bree v. Marescaux* (1881), 7 Q. B. D. 434.

(r) *Witted v. Galbraith*, [1893] 1 Q. B. 431; S. C. on appeal, *ibid.*, p. 577; notwithstanding the earlier case of *Yorkshire Tannery Co. v. Eglinton Chemical Co.* (1884), 33 W. R. 162.

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Torts—
Nature.

Tort must be
actionable
by *lex fori*
and wrongful
by *lex loci*.

been given. The action complained of must have been a legal wrong both by the law of the place where it was done, and by the law of England, where the action for damages is brought. "As a general rule," said Willes, J., delivering the judgment of the Court of Exchequer Chamber in *Phillips v. Eyre* (1870), 6 Q. B. 1, "in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England; therefore, in *The Halley* (1867), 2 P. C. 193, the Judicial Committee pronounced against a suit in the Admiralty founded upon a liability by the law of Belgium for collision caused by the act of a pilot whom the shipowner was compelled by that law to employ, and for whom, therefore, as not being his agent, he was not responsible by English law. Secondly, the act must not have been justifiable by the law of the place where it was done." So it is said by Mellish, L.J., in the case of *The M. Moxham* (1876), 1 P. D. 107: "The law respecting personal injuries and respecting wrongs to personal property appears to me to be perfectly settled that no action can be maintained in the courts of this country on account of a wrongful act either to a person, or to personal property, committed within the jurisdiction of a foreign country, unless the act is wrongful by the law of the country where it is committed, and also wrongful by the law of this country." The principle was followed to its full extent in *Carr v. Francis Times & Co.*, [1902] A. C. 176, when it was held by the House of Lords that no action could be maintained for the seizure of British goods on board a British ship within the territorial waters of Muscat, under a proclamation issued by the Sultan of that State, and expressly declared by the same sovereign to have been lawful.

But though it is necessary that the alleged tort should be actionable by English law, and wrongful by the law of the place where it was committed, it is not necessary that it should be actionable there. In other words, the remedy there need not be civil, in order to give a civil remedy in England. It is sufficient that it should be not justifiable or excusable there (s).

It would seem logically to follow that any defence which would be valid in the country where the alleged tort was committed ought to be recognised here. This would appear to be so, even when the act has been legalised by *ex post facto* legislation; but *contra*, where the *lex loci* only required that criminal proceedings

(s) *Machado v. Fontes*, [1897] 2 Q. B. 231. Cf. per Wightman, J., in *Scott v. Seymour* (1862), 1 H. & C. 219. See also the cases cited *supra*, p. 514, n. (f).

should be taken and concluded before an action for damages was brought (*t*). In *Blad v. Bamfield* (1673), 3 Swan. 603, Lord Nottingham held that a seizure in Iceland, authorised by the Danish Government and valid by the law of the place, could not be questioned by civil action in England, although the plaintiff, an Englishman, insisted that the seizure was in violation of a treaty between this country and Denmark—a matter for remonstrance between the Governments, not for litigation between the subjects. In *Dobree v. Napier* (1836), 1 Bing. N. C. 781, Admiral Napier having, when in the service of the Queen of Portugal, captured in Portuguese waters an English ship breaking blockade, was held to be civilly justified, by the law of Portugal and the law of nations, though his serving a foreign prince was contrary to English law, and subjected him to penalties under the Foreign Enlistment Act. So, in *R. v. Lesley* (1860), 29 L. J. M. C. 97, it was held that the master of an English vessel, indicted for an assault and false imprisonment, who had contracted with the Chilian Government to carry certain banished prisoners from Chili to Liverpool, and had in fact done so, after receiving and imprisoning the prisoners at Chili, could justify his acts under the authority of the Chilian Government in respect of all that had taken place within the local jurisdiction of Chili, but not in respect of the continued imprisonment when the ship had passed out of Chilian waters. This was a case of criminal indictment, but the reasons of the decision would, of course, have been equally applicable to a civil action for false imprisonment or trespass to the person. “We assume,” said Erle, C.J., “that the Chilian Government could justify all that it did within its own territory, and we think it follows that the defendant can justify all that he did there as agent for the Government and under its authority.” In *Phillips v. Eyre* (*supra*), the last decision of importance on the subject, the defendant pleaded, to an action for false imprisonment and assault in the island of Jamaica, that since the grievances complained of a retrospective Act of indemnity had been passed by the Legislature of Jamaica, and it was held that this was a sufficient answer to the action; although the defendant was at the time the Governor of Jamaica, and had assented to the passing of the Act, which could not have become law without his sanction. This case was decided upon demurrer; but in the leading case of *Mostyn v. Fabrigas* (*supra*), where an action was brought against the Governor of Minorca for a similar trespass, the justification pleaded by the defendant, that he had acted under

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(*t*) *Scott v. Seymour* (1862), 31 L. J. Ex. 457; 32 L. J. Ex. 61; 1 H. & C. 219.

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the law of the island and solely in his official capacity, was negatived by the jury, and the question of the extraterritorial operation of the local law did not therefore arise. It was, however, accorded an implied recognition by the Privy Council in *Hart v. Gumpach* (1873), 4 P. C. 439. In that case an action was brought, in the British Supreme Court for China and Japan, for false and fraudulent representations made by the defendant, occupying an official post in the service of the Emperor of China, to the principal of the Foreign Board at Peking, respecting the conduct of the plaintiff as a professor in the college established there, which led to his dismissal by that Board. In ordering a new trial on the ground of misdirection, it was said that, if it were shown that, by the law and customs of China, officers in the service of the Government were absolutely protected in making reports concerning their subordinates, and that it was against the policy of that empire to allow them to be questioned by any Court, it might be proper to hold that it would be contrary to the comity of nations, and therefore contrary to public policy in the eyes of an English Court, to allow a British subject, who had voluntarily entered into the service of the Chinese Government, to maintain any action for the representations in question.

Outside any
municipal
jurisdiction.

When the act complained of takes place in a locality over which no municipal law extends, so as to be competent to decide its wrongful or innocent nature, it would seem (*u*) that the *lex fori* must necessarily be followed, in the absence of any other with authority to speak. Thus, in an action by a submarine telegraph company against the foreign owners of a ship, for negligence and want of proper care in navigating their ship, whereby the cable of the plaintiffs, stretching from Dover to Calais, was damaged by the defendants' anchor, it was apparently assumed that the law of England was the proper measure of the negligence complained of, and of its actionable character, whether the injury was done to the cable within or without the limit of three miles from the English shore (*x*). It could not, of course, be contended that the English Court had no jurisdiction to try an action for personal damages, whatever the locality of the *factum*, on the principles already explained; and it did not appear that any law could be invoked to measure a tort committed on the high seas, or (in this

(*u*) Story suggests (§ 423) that, with respect to such torts as these, each nation would either apply its own law (*i.e.*, the *lex fori*), or would apply the same law that the nation to which the tortfeasor belonged would apply if the circumstances were reversed, following the rule of reciprocity. See *The Girolamo* (1834), 3 Hagg. 169.

(*x*) *Submarine Telegraph Co. v. Dickson* (1864), 15 C. B. (N.S.) 759. As to the three-mile zone, see *R. v. Keyn* (1877), 2 Ex. D. 63, and the Territorial Waters Jurisdiction Act, 1878. In the case cited in the text it was alleged that the cable was lying in the high seas within the three-mile zone by virtue of a charter from the Crown.

case) on the soil at the bottom of the high seas, but the law of the *forum* in which the action was brought. Torts in the nature of collisions between vessels on the high seas are within the original jurisdiction of the High Court of Admiralty, whatever the nationality of the parties, though it may be that the Court has a discretion whether or not it will interfere between litigants who are both the domiciled subjects of a foreign State (*y*); and by modern statutes, the same Court has been given jurisdiction over any claim for damage done by any vessel, whether to another vessel or to person or property in some other form (*z*). These latter torts also were originally within the jurisdiction of the Admiralty Court, according to Sir R. Phillimore in *The Sylph* (*a*), in which case the statutory jurisdiction just referred to was held to include the case of damage inflicted by a steamer on the River Mersey upon a diver during his employment at the bottom. The same jurisdiction had been already applied to a cause of damage against a ship for injury to a breakwater (*b*). It is perhaps superfluous to repeat that in such a case, if the breakwater injured were an integral part of the soil of a foreign State, the question of jurisdiction will arise in a more serious form (*c*).

It was held by the Court of Appeal in *Panagotis v. Pontiac*, [1912] 1 K. B. 74, that an alien is not entitled to the benefit of the Workmen's Compensation Act for an accident occurring in England or English territorial waters.

(iii.) MEASURE OF THE REMEDY.

The general rule will be stated in its proper place, that all questions of remedy or procedure belong to the *lex fori* (*infra*, C. X.); and the theory of the remedy available in case of tort is, of course, no exception to the general rule. "As to foreign laws," says Willes, J., in *Phillips v. Eyre*, "which affect the liability of parties in respect of bygone transactions, the law is clear that if the foreign law touches only the remedy or procedure for enforcing the obligation, as in the case of an ordinary statute of limitations, such law is no bar to an action in this country; but if the foreign law extinguishes the right, it is a bar in this country equally as if the extinguishment had been by a release of the party, or an Act of our own Legislature." The question, in fact, is always whether the foreign law goes to the nature of the right, the essence of the obligation, or whether it

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(*y*) Per Sir R. Phillimore, in *The Mali Ivo* (1869), L. R. 2 A. & E. 356.

(*z*) 24 Vict. c. 10, s. 7; 3 & 4 Vict. c. 65.

(*a*) (1867), L. R. 2 A. & E. 24. The law on this branch of the subject is exhaustively collected by Story in *De Lovio v. Boit* (1815), 2 Gallison, 398.

(*b*) *The Uhla* (1867), L. R. 2 A. & E. 29.

(*c*) *The M. Mozham* (1876), 1 P. D. 107, *supra*, p. 513.

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Lex fori
cannot create
liability.

only affects the manner in which the right is to be enforced, or the obligation dissolved. If the latter is its true construction, it has no operation except in its own tribunals; if the former, its decision must be respected by all Courts alike. In the words of Willes, J., which have been already cited, “the civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law. Therefore, an act committed abroad, if valid and unquestionable by the law of the place, cannot, so far as civil liability is concerned, be drawn in question elsewhere, unless by force of some distinct exceptional legislation, superadding a liability other than and beside that incident to the act itself.” But if the law of the place make the act in question an actionable wrong, it is actionable in English Courts according to the English law and method of procedure. It can scarcely be said that the distinction between civil and criminal proceedings is one of remedy or procedure. An act which the law of the place forbids, and imposes a penalty on, is not necessarily an act for which the same law would give the aggrieved person an action for damages; and therefore, though it may be a wrong by the law of the place where it was done, it may not be an actionable wrong. The question whether, under such circumstances, it would be an actionable wrong in an English Court arose in *Scott v. Seymour* (1862), 1 H. & C. 219; but it was ultimately held to be unnecessary to decide it, inasmuch as the plea in dispute was construed not to amount to an averment that the wrong was not actionable at all in the civil courts of the country where it was committed. Wightman, J., expressed an opinion that, at any rate between British subjects, the fact that the local law gave no civil remedy for a wrong, which it nevertheless made criminal, would not prevent an action for damages from being maintained in England. “I find no authority for holding, even if the Neapolitan law gives no remedy for an assault and battery, however violent and unprovoked, by recovery of damages, that therefore a British subject is deprived of his right to damages given by the English law against another British subject.” The other judges, however, carefully guarded themselves against being supposed to concur in this view, and the distinction between British subjects and foreigners, at any rate, seems arbitrary and unfounded. The reasonable construction of the recent authorities seems to point to an opposite conclusion, and it will probably be safer to say that the tortious or illegal nature of an act is to be decided once for all by the law of the place where it was committed. The remedy alone is a matter for the *lex fori* to regulate; i.e., assuming that an act is a tort, and therefore an actionable wrong, the *lex fori* must prescribe the

mode in which the action is to be brought. There is, at any rate, no direct authority for allowing the *lex fori* any further effect, or permitting it to say, in any case, that an action shall be maintained which could not have been brought at all in the Courts of the place where the act was done. Nor ought the *lex fori* to be allowed to determine the person on whom the liability to an action attaches, by whatever other law that may eventually be decided. In *General Steam Navigation Co. v. Guillou* (1843), 11 M. & W. 879, the action was brought against the defendant as alleged owner of a certain vessel, for so negligently navigating her by his servants on the high seas as to come into collision with and sink a ship of the plaintiffs; and the defendant pleaded that the vessel was the property of a society or company established by French law, of which he was a shareholder and the acting director, and that by French law he, the defendant, was not responsible for or liable to be sued or impleaded individually, or in his own name or person, in respect of the causes of action in the declaration mentioned, but the said company alone, by their said style or title, or the master or person in command of the ship for the time being, was responsible for and liable to be sued and impleaded for the said causes of action. The Court of Exchequer were divided as to the true construction to be put on this plea, but they were agreed in expressing a strong opinion that if the plea was to be taken as averring that, by the law of France, the defendant was not liable for the acts of the master of the vessel, but that a body established by French law, and analogous to an English corporation, were the proprietors of the vessel, and alone liable for the acts of the master, who was their servant and not the servant of the individuals composing that body, then there was a good defence to the action. On the other hand, it was said that if the plea merely meant that the proper course of proceeding in a French Court would be to sue the defendant jointly with the other shareholders of the company under the name of their association, it would undoubtedly be bad; for it was well established "that the forms of remedies and modes of proceeding were regulated solely by the law of the place where the action was instituted—the *lex fori*; and it was no objection to a suit instituted in proper form in England, that it would have been instituted in a different form in the court of the country where the cause of action arose, or to which the defendant belonged." It appears quite clear, if the former of the two suggested constructions is adopted, that the *lex fori* could have had no title to interfere. The rule of maritime law adopted in England is no doubt that the owner is liable for the negligent navigation of the master, but the vessel in question was sailing

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under the flag of France, and owned wholly in that country. The question, therefore, involved in the plea, adopting the construction indicated, was simply of the ownership according to the law of France. If the defendant was not owner, the master was not his servant, but the servant of the French corporation, who alone were liable for his acts; and the law of the ship's flag was obviously the only one competent to determine the question.

The *lex loci actus* is clearly the proper law to measure the amount of damages properly flowing from a tortious act. Thus it was decided in *Ekins v. East India Co.* (1717), 1 P. Wms. 395, that where there had been a tortious conversion of a ship abroad, interest was to be calculated, in assessing the damages, on the value of the ship at the rate of interest fixed by the foreign law. The calculation of interest, on a breach of contract, is almost invariably determined, on a similar principle, by the law of the place where payment ought to have been made; the theory being that the plaintiff has a right to be put in the same position, as to all questions of interest and currency, as if payment had been made at the place and time stipulated for (*e*). Thus where the action is against the acceptor of a bill, the law of the place where he agrees to pay prevails; and on the same principle it was held in *In re State Fire Insurance Co.*, 32 L. J. Ch. 300, that where the claim was in fact against the drawers, who had drawn the bill in Canada, the Canadian law determined the interest. Under the International Copyright Act, 1886, the same rule has been applied to an action for penalties in England for infringement of a French copyright. In this case it was argued, but unsuccessfully, that no greater penalty could be recovered than would have been recoverable in France (*f*).

Torts on
high seas.

In pronouncing upon torts committed upon the high seas, the Court of Admiralty must, of course, be guided by maritime law without reference to the municipal law of either of the litigant parties; except where English statutes have laid down different principles for its guidance. The maritime law as administered in English Courts is in fact, according to the latest expressions of judicial opinion, English law (*g*); and in applying it to actions founded upon torts committed on the high seas, the law of the *forum* is, in a sense, adopted in the place of any with a better claim to be regarded as the *lex loci*.

Maritime
law.

The true conception of this law is, more probably, that law

(*e*) *Suse v. Pompe* (1860), 8 C. B. (N.S.) 538; *Cash v. Kennion* (1805), 11 Ves. 314; *Scott v. Bevan*, 2 B. & Ad. 78; *Cockerell v. Barber* (1810), 16 Ves. 461.

(*f*) *Baschet v. London Ill. Standard Co.*, [1900] 1 Ch. 73 (where the *lex fori* and the *lex loci actus* were the same). Cf. also *The Circe*, [1906] P. 1.

(*g*) See per Willes, J., in *Lloyd v. Guibert* (1865), 1 Q. B. 125; *The Hamburg* (1864), 2 Moo. P. C. (N.S.) 289; *supra*, p. 437, n. (*s*).

which the English Court considers to be regarded by all maritime civilised nations—and itself—as the *lex loci*—the law operating upon the high seas, and bearing the same relation to that part of the surface of the earth that the municipal law of any independent State bears to the territory of that State. It is undoubtedly founded upon and has originated in the principles of law which have been adopted as common by the majority of maritime nations, and is therefore, in one sense, international. In another sense it is municipal; that is, it is the law which the English Court of Admiralty applies to certain transactions happening out of British dominions, to which the ordinary statute law of the realm does not, in the absence of an expressed intention to that effect, apply. It is laid down by Blackstone (*h*) that “affairs of commerce are regulated by a law of their own, called the law merchant, or *lex mercatoria*, which all nations agree in and take notice of.” With respect to the liability of the owners of a vessel for damage done by her by collision on the high seas, it is clear that by this law, apart from the effect of English statutes, the liability went to the full extent of the tort, nor was any limit imposed on the duty of making compensation (*i*); and this is, of course, also the rule of the English Common Law. By the statute 53 Geo. 3, c. 159, s. 1, it was, however, enacted that shipowners should not be liable for any damage occasioned by the ship beyond the value of the ship and freight (*k*). The Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63), s. 64, adopted this principle by limiting the liability of the owners to an aggregate amount calculated in proportion to the ship’s tonnage, and extended it in terms to the owners of foreign (*l*) as well as British ships. Under the previous statute it had been held that the limitation of liability applied only where both litigants were British, and that the English law could be invoked neither for nor against either plaintiff or defendant in the English Court where a

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(*h*) 1 Bl. Com. c. 7, p. 273; 4 Bl. Com. c. 5, p. 67.

(*i*) Per Sir J. Nicholl in *The Girolamo* (1834), 3 Hagg. Adm. 186; see also *The Carl Johann* (1821), cited 1 Hagg. Adm. 109.

(*k*) Re-enacted by 17 & 18 Vict. c. 104, s. 504.

(*l*) Under s. 60 of the Merchant Shipping Amendment Act, 1862, whenever it is made to appear that the rules concerning the measurement of tonnage of merchant ships for the time being in force under the Merchant Shipping Act, 1854, have been adopted by the Government of any foreign country, and are in force in that country, it may be directed by Order in Council that the ships of such foreign country shall be deemed to be of the tonnage denoted in their certificate of registry or other national papers, and thereupon re-measurement in England shall not be necessary. It would appear that an Order in Council made under this section is not invalid because it appears on the face of it that the adoption of the English rules of measurement has not been absolute, if there has been a *substantial* compliance with the statute; but such an order, when made, does not make the foreign certificate *conclusive* evidence of tonnage, any more than an English certificate of registry would be: *The Franconia* (1877), 3 P. D. 164.

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foreign ship was concerned (*m*). It must therefore be taken as having been decided that this municipal law limiting the liability of shipowners was not and is not a law regulating the remedy merely, with which the *lex fori* has alone to do. “Clearly,” said Page-Wood, V.-C., in *Cope v. Doherty*, “an Act which limits the damages to which the shipowner is to be liable under circumstances like the present deals with the substance and not the form of the procedure. It in effect forms a contract that, whereas by the natural law the owner of the ship or property that has been injured would be entitled to damages to the full extent of the loss that he has sustained, all those persons upon whom the Legislature can impose such a contract, that is to say, all its own subjects, shall forego that which the natural law—the Common Law, as we should call it in England—would give them, and shall be entitled only to the amount of the value of the ship by which the injury has been inflicted, and of the freight due or to grow due in respect of such ship during the voyage.” It had been contended in argument in this case that, whether such a limitation of liability was a matter of remedy and procedure for the *lex fori* or not, the English rule could not be applied, because the proper construction of the statute (17 & 18 Vict. c. 104, s. 504) was that it did not intend to limit the liability of foreigners. So far, however, as the liability of a foreign shipowner is concerned, it is now unnecessary to discuss the former point, or to attempt any criticism of the “contract” which the statute was said by Lord Hatherley to impose upon British subjects, inasmuch as the later statutory provisions (*n*) expressly include the owners of foreign as well as British ships.

The state of the law, then, when this enactment was passed, was as follows :—No limitation of liability for torts was imposed upon shipowners by the general law maritime, and the English statutes which did impose such a limitation had been held only to

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(*m*) *Cope v. Doherty* (1858), 4 K. & J. 367; *The Wild Ranger* (1862), 1 Lush. 553.

(*n*) S. 54 of the Merchant Shipping Acts Amendment Act, 1862 (25 & 26 Vict. c. 63), commences as follows : “The owners of any ship, whether British or foreign, shall not, in cases where all or any of the following events occur without their actual fault or privity, that is to say,

“(3) Where any loss of life or personal injury is by reason of the improper navigation of such ship as aforesaid caused to any person carried in any other ship or boat :

“(4) Where any loss or damage is by reason of the improper navigation of such ship as aforesaid caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat ;

“Be answerable in damages in respect of loss of life or personal injury, either alone or together with loss or damage to ship’s boats, goods, merchandise, or other things, to an aggregate amount exceeding £15 for each ton of their ship’s tonnage ; nor in respect of loss or damage to ship’s goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding £8 for each ton of the ship’s tonnage.” This section is re-enacted by 57 & 58 Vict. c. 60, s. 503, *qu. v.*

apply to cases where both the plaintiff and defendant were British subjects—*i.e.*, in the case of a collision, where both the ships sailed under the British flag, on the ground that the full liability of foreign shipowners was not cut down by the English Merchant Shipping Acts, and that these Acts were not to be construed as depriving such foreign shipowners of their full natural rights against British or other shipowners without express words to that effect (*o*). Then came the statute (25 & 26 Vict. c. 63, s. 104) which in terms limited the liability of foreign shipowners. The previous cases having been decided on the ground, amongst others, that the English statutes were not to be construed as limiting the *rights* of foreign shipowners against British subjects, because they had not limited their *liability* when the position was reversed, the question arose whether, now that the *liability* of foreign owners was limited in express terms, the *rights* of foreign owners—*i.e.*, the liabilities of British owners when sued by foreigners—were not to be limited in the same way. It was held in *The Amalia* (1863), 1 Moo. P. C. (N.S.) 471 (*p*), by the Privy Council, confirming the judgment of Dr. Lushington, that they were to be so limited, the statute having now enabled an English Court to do reciprocal justice when it was sought to impose unlimited liability on a foreign ship. “If the statute in question,” says Dr. Lushington, “gives the right of limited liability to the British shipowner and the foreign shipowner alike, if there be perfect reciprocity, then complete justice is done, and I have no longer to struggle against an interpretation producing injustice. In construing this section, therefore, I must look to see whether it purports to affect the owners of British ships and the owners of foreign ships; and if I find, from the words of the section and from the whole context and subject-matter, that it was the intention of the statute to make limited liability for both British and foreign ships, then I consider there is no serious objection to the British Parliament legislating for foreigners.”

The last paragraph from the above quotation indicates the real nature of the controversy. It had been decided in the previous cases that a law limiting the liability of a tortfeasor was not a law relating to procedure (though it did undoubtedly directly affect the *remedy* available), and that it was not therefore applicable, in the character of the *lex fori*, to foreigners. It was, however, indisputable that it was competent to the English Legislature to direct its Courts to apply it to any or all of the causes

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(*o*) *Cope v. Doherty* (1858), 2 K. & J. 367; *The Wild Ranger* (1862), 1 Lush. 553; 32 L. J. Adm. 49.

(*p*) An elaborate criticism of this case, in the form of a memorial to the Board of Trade from the foreign owners, will be found in Wendt's Maritime Legislation (1888), pp. 513-526, *sub nomine*, *The Marie de Brabant*.

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coming before them, and thus to legislate for foreigners, so far as they were litigants before English tribunals. The only question was, how far the English Legislature had done so; and it had been held that the previous enactment (17 & 18 Vict. c. 104, s. 504), had, in fact, legislated for foreigners as well as British subjects in respect of collisions taking place within a distance of three miles from the British shores (*q*)—the limit to which the jurisdiction of an independent State claims by the law of nations to extend (*r*). The construction put by the Privy Council in the case of *The Amalia* (1863), 1 Moo. P. C. (N.S.) 471, upon the last statute (25 & 26 Vict. c. 63) is in effect that the English Legislature has now legislated for foreigners who are concerned in collisions on any part of the high seas, whenever the rights or liabilities of those foreigners come in question in an English Court, so far as to limit their right to recover and their liability to pay damages by one and the same rule. It was expressly decided in *The Leon* (1881), 6 P. D. 148, that the law of their vessel's own flag cannot be pleaded by the defendants in an action (*in personam*) by British owners for damage by collision. The law applicable is "the general maritime law as administered in England" (*s*).

It may here be added that the section (s. 503) in the Merchant Shipping Act, 1854, which immediately preceded the provision limiting the liability of shipowners in case of collision, and conferred an absolute protection on shipowners in the case of damage done to cargo by fire, or of loss of precious metals and stones by theft, where the nature and value of such articles had not been inserted in the bill of lading, was uniformly construed as applying only to British ships (*t*), and has not been extended, like s. 504, to foreign shipowners by any later enactment. These provisions are re-enacted in the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 502—509.

The provisions of the Merchant Shipping Acts which have just been considered relate strictly to the measure of the remedy, though, as has been already pointed out, it has been decided that they are not regulations of remedy or procedure in such a sense as to be applicable to foreigners simply in the character of the *lex fori*. Certain other cases, however, which were decided on

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(*q*) *General Iron Screw Colliery Co. v. Schurmans* (1860), 1 J. & H. 180; but see this case questioned in *The Saxon* (1862), 1 Lush. 412.

(*r*) *R. v. Keyn* (1877), 2 Ex. D. 63; Territorial Waters Jurisdiction Act, 1878.

(*s*) As to this expression, see per Willes, J., in *Lloyd v. Guibert* (1865), 1 Q. B. 115, 123, 125; per Brett, L.J., in *The Gaetano* (1882), 7 P. D. 137; and *supra*, p. 437, n. (*s*).

(*t*) *The General Iron Screw Colliery Co. v. Schurmans* (1860), 1 J. & H. 180; *Cope v. Doherty* (1858), 4 K. & J. 367; *The Girolamo* (1834), 3 Hagg. Adm. 187; *The Carl Johann* (1821), cited 1 Hagg. Adm. 113.

the applicability to foreigners of the English statutory regulations concerning sailing and navigation, have in reality nothing to do with the remedy at all, though they are generally cited in connection with the questions considered above. Those regulations are, in fact, municipal laws, intended to follow British subjects over any part of the high seas, and to govern their conduct *inter se*, so as to determine the tortious or innocent nature of the navigation of a British ship which results in collision. Accordingly, it seems to have been rightly decided that they are inapplicable whenever either of the parties to the collision was foreign (*u*); and this although s. 298 of the Merchant Shipping Act, 1854, provides that if it appears to the Court that the collision was occasioned by the breach of any of the statutory rules, the owner of the ship by which such a rule has been infringed shall not be entitled to recover any recompense whatever for any damage sustained by such ship in such collision, unless it is shown to the satisfaction of the Court that the circumstances of the case made a departure from the rule necessary. In *The Zollverein* it was alleged that the British vessel, which had been in collision with a Prussian brig, had violated s. 296 of the Merchant Shipping Act, 1854, which imposed upon her a statutory duty of porting her helm in circumstances under which the general maritime law would not require it. It was held that the owners of the Prussian ship could not set up against the English vessel this breach of an English statute. Dr. Lushington, after quoting Story's *dictum* (*x*) that, with regard to the rights and merits involved in actions, the law of the place where they originated was to be followed, but the forms of remedies and the order of judicial proceedings were to be according to the *lex fori*, proceeded as follows: "Now, does s. 296 relate to the merits and rights of the case, or to the remedy and order of judicial proceeding? . . . I am of opinion that, in its true meaning, s. 296 is wholly applicable to the merits of the case; it determines how vessels shall conduct themselves at the time of collision on the high seas; the Legislature of this country has no power to bind foreign vessels, in such a condition. It is true that s. 298 relates to remedy, but the application of the section is entirely founded on and emanates from s. 296. Then comes the question, whether, in a trial of the merits of a collision, a foreigner may urge in his defence that the British vessel, though free by the law maritime, has violated her own municipal law, and so, being plaintiff, cannot recover? Reverse the position: suppose the foreigner plaintiff, and to have done his duty by the law maritime. I am clear that he must recover for the damage

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(*u*) *The Dumfries* (1856), Swab. 63; *The Zollverein* (1856), Swab. 96; *The Saxonia* (1862), 1 Lush. 412; 17 & 18 Vict. c. 104, ss. 295-298.

(*x*) Story, Conflict of Laws, § 558.

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done; if so, it is contrary to equity to say that the British ship-owner, *in eadem conditione*, shall not recover against the foreigner. What right can the foreigner have to put forward British statute law, to which he is not amenable so far as the merits are concerned?" (y). In *The Saxonia* (z), the collision in question took place in the Solent, within three miles of the British shore, and it was nevertheless held that the statute was inapplicable to foreign vessels even in those territorial waters, though little attention was paid in the judgment to the contention that the law of nations gave jurisdiction to every State within three miles from its coasts. It appears more than doubtful whether these provisions of the Merchant Shipping Act are applicable to foreign vessels on the Thames or other English tidal river, though a custom of navigation which has grown up there in consequence of the statute is no doubt binding upon them (a).

In the *Oceanic Steam Navigation Co. v. Mellor* (1913), 233 U. S. 718, the owners of the *Titanic*, which after collision with an iceberg on the high seas had suffered a total loss, filed a petition for limitation of its liability under the laws of the United States (Rev. Stats. §§ 4283, 4284, 4285, and Admiralty Rules, 54—56). The questions for the decision of the Supreme Court were :—

(A) Whether, in the case of a disaster upon the high seas where (1) only a single vessel of British nationality is concerned, and where (2) there is nothing before the Court to show what, if any, is the law of the foreign country to which the vessels belong touching the owner's liability for such disaster—such owner can maintain a proceeding under the laws of the United States?

(B) Whether, if in such a case it appears that the law of the foreign country to which the vessel belongs makes provision for the limitation of the vessel-owner's liability, upon terms and conditions different from those prescribed in the statutes of this country, the owner of such foreign vessel can maintain a proceeding in the Courts of the United States under the said Statutes and Rules?

In the event of the answer to Question (B) being in the affirmative :

(C) Will the Courts of the United States in such proceedings enforce the law of the United States or of the foreign country in respect to the amount of such owner's liability? Questions (A)

(y) Similarly, a defendant in a personal action for damage by collision cannot set up the law of his own flag : *The Leon* (1881), 6 P. D. 148.

(z) (1862), 1 Lush. 412. The case of *The General Iron Screw Colliery Co. v. Schurmans* (1860), 1 J. & H. 180, must be regarded as questioned, if not over-ruled, by this decision.

(a) *The Fyenoord* (1858), Swab. 377; and see *The Milford* (1858), *ibid.*, 367; *The Annapolis* (1861), 1 Lush. 295; MacLachlan, Shipping (1923), p. 212, and the Pilotage Act, 1913, 2 & 3 Geo. 5, c. 31.

and (B) were answered by the Court in the affirmative, and to Question (C) the Court replied that the law of the United States applied and should be enforced, even in the case when only a single foreign ship is concerned. "It is competent," said Holmes, J., "for Congress to enact that in certain matters belonging to Admiralty jurisdiction parties resorting to our courts shall recover only to such extent or in such way as it may mark out."

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In *H.M.S. King Alfred*, [1914] P. 84, in the course of manœuvres in line ahead in July, 1913, the *King Alfred* collided with the *Ambe*, a Spanish vessel, and sank her. It was proved that the *Ambe* observed the provisions of the international regulations for preventing collision at sea, and that the *King Alfred* was alone to blame since he knew that the *Ambe* was foreign and that the King's Regulations equivalent to the international regulations apply, whilst those in charge of the *Ambe* did not know and could not be taken to know of the Board of Trade notice to mariners warning "single ships approaching squadrons" not to approach the warships so closely as to involve risk of collision, or attempt to pass through or break the line of the squadron, and to adopt timely measures to keep out of the way.

International Copyright.

The special form of tort known as infringement of copyright does not strictly form part of the present subject; except so far as it involves the general principle, already discussed, that a tort to be actionable must be a tort by the law of the country where the remedy is sought. It may, however, be convenient in this place to indicate briefly the general rules by which the rights of authors in respect of foreign copyrights are regulated. The infringement complained of must, of course, have been committed in the country where the remedy is sought, as the Courts will not interfere to prevent (and probably not to punish) an infringement in a foreign country (b). Where penalties are sued for, their amount is decided by the *lex fori*, and not by the law of the country where publication first took place, or to which the plaintiff belongs by nationality or domicile (c).

It appears to be clear that, apart from the International Copyright Acts, the only works in which the English Courts recognised copyright were those published, and first published, within the United Kingdom (d); thus excluding not only foreign countries,

(b) "*Morocco Bound*" *Syndicate v. Harris*, [1895] 1 Ch. 535.

(c) *Baschet v. London Ill. Standard Co.* (1900), 69 L. J. Ch. 35.

(d) *Routledge v. Low* (1868), L. R. 3 H. L. 100, per Cairns, C., p. 110.

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but even the British dominions beyond the seas. The first International Copyright Act was that of 1844 (7 & 8 Vict. c. 12), amended in 1852 (as to France) by 15 & 16 Vict. c. 12, and in 1875 by the 38 & 39 Vict. c. 12; under which statutes numerous Orders in Council (now repealed) were made. In 1885 a Conference of European Powers was held at Berne, and a draft convention on the subject of copyright was agreed to. This was followed in the United Kingdom by the International Copyright Act of 1886, (49 & 50 Vict. c. 33), which recited an agreement to the draft convention of Berne, and empowered the Crown to make Orders in Council carrying out and adopting its provisions. This Act was supplemented on December 6, 1887, by an Order in Council adopting the Berne Convention (which had in the meantime been signed), which is to be construed as part of the Act. The Berne Convention was revised at Berlin on 13th November, 1908, and completed by the additional protocol signed at Berne on 20th March, 1914. By Art. 286 of the Treaty of Versailles, 1919, this convention was renewed in so far as it was not affected or modified by the exceptions and restrictions resulting thereupon. Similar provisions are contained in the other Peace Treaties. The States at present forming the "Copyright Union," and governed by the Berne Convention, are Great Britain, Belgium, France, Germany, Italy, Spain, Switzerland, Luxemburg, Monaco, Norway, Japan, Tunis, and Hayti. A separate convention has been made with Austria and Hungary (*e*).

It will be noticed that the United States form a notable exception to the countries comprising the Copyright Union. It follows that English copyright can only be obtained for a work published in the United States by simultaneous publication in England, it having been decided that neither English nationality nor English residence is necessary for that purpose (*f*). In like manner an English author, in order to obtain copyright in the United States as well as in the United Kingdom, must publish simultaneously in both countries (*g*).

So far as the British Colonies are concerned, it is provided by s. 8 of the Act of 1886, that the Copyright Acts shall apply to a literary or artistic work first produced in a British possession in

(*e*) The above brief summary has been obtained from Scrutton on Copyright (3rd edition), in which the Acts, Conventions and Orders will be found set out *in extenso*.

(*f*) *Routledge v. Low* (1868), L. R. 3 H. L. 100, per Lord Cairns, C., and Lord Westbury.

(*g*) Scrutton on Copyright (3rd ed.), pp. 230-233; where special distinctions affecting (a) plays, (b) works of art, are indicated.

like manner as they apply to a work first produced in the United Kingdom (*h*).

Now by the Copyright Act, 1911 (1 & 2 Geo. 5, c. 46), which came into operation 1st July, 1912, the above-mentioned Acts of 1844, 1852, 1875, 1886, have, amongst others, been repealed, and various amendments and alterations have been introduced in the law of copyright generally. For our present purpose, it will suffice to refer to s. 29, which deals with international copyright. By this section His Majesty is empowered to direct, by Order in Council, that the Act, except such parts of it as may be specified in the Order, shall apply—

- (a) to works first published in a foreign country named in the Order (*i*), as if they had first been published within the parts of His Majesty's dominions to which the Act extends;
- (b) to literary, dramatic, musical, and artistic works, whose authors were at the time of the making of the work subjects of a foreign country named in the Order, as if they were British subjects;
- (c) in respect of residence in a foreign country named in the Order, as if such residence was in the parts of His Majesty's dominions to which the Act extends.

The section contains the following provisos :

- (i.) before making such an Order in respect of any foreign country, other than a country with which His Majesty has entered into a copyright convention, His Majesty is to be satisfied that the foreign country has made, or has undertaken to make, such provisions as appear to His Majesty necessary for the protection of works entitled to Imperial Copyright;
- (ii.) the Order may provide that the term of the copyright shall not exceed that allowed by the law of the country to which the Order relates;
- (iii.) the provisions of the Act as to the delivery of copies of books shall not apply unless so specified in the Order;
- (iv.) the Order may provide that the rights are to be subject to conditions and formalities;
- (v.) the Order may make such modifications as to ownership of copyright as appear necessary, having regard to the law of the foreign country;
- (vi.) the Order may make such modifications in the provisions of the Act as to existing works, as may seem necessary,

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Copyright
Act, 1911.

(*h*) See as to Canada, 38 & 39 Vict. c. 53, assenting to an Act of the Canadian Legislature passed in 1875.

(*i*) Under this section the Act was applied to Austria-Hungary by Order in Council dated June 24, 1912 (St. R. & O., 1912, No. 914).

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*Torts—
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to British
possession.

and may provide that those provisions shall not revive any right of preventing the production or importation of any translation in any case where the right has ceased under s. 5 of the International Copyright Act, 1886.

Such an Order extends to all His Majesty's dominions to which the Act extends except self-governing dominions, and any other possession specified in the Order (s. 30 (1)).

In the self-governing dominions to which the Act extends the power of making Orders under this part of the Act lies with the Governor in Council (s. 30 (2)).

His Majesty has power to except any part of his dominions, not being a self-governing dominion, from the operation of an Order except so far as is necessary for preventing any prejudice to rights (*k*) acquired before the date of the Order (s. 30 (3)).

By St. R. & O., 1912, Nos. 912, 913 and 914, the Copyright Act, 1911, may be applied (a) to works first published in a foreign country to which the Order relates, in like manner as if they were first published within the parts to which the Act extends; (b) to literary, dramatic, musical and artistic works, the authors whereof were at the time of the making of the work subjects or citizens of a foreign country to which the Order relates, in like manner as if the authors were British subjects; (c) in respect of residence in a foreign country to which the Order relates in like manner as if such residence were residence in such part of His Majesty's dominions as aforesaid.

Stat. R. & O., 1912, No. 913 now applies to Czecho-Slovakia (1921); Brazil (1922); Hungary (1922); Free City of Danzig (1922).

The copyrights of works first published in an enemy country during the war of 1914 were vested in the Public Trustee under the Trading with the Enemy (Copyright) Act, 1916 (6 & 7 Geo. 5, c. 32).

International Patent Rights.

Actions for infringement of patent rights, like those for violation of copyright, depend upon the *lex fori*. No recognition was given by the common law to patent rights, or other analogous protections of inventions, conferred or created by any other State. The present international recognition of patents, so far as Great Britain is concerned, depends upon ss. 103, 104 of the Patents Act, 1883 (46 & 47 Vict. c. 57), as amended by s. 6 of the Act of 1885, and s. 1 of the Act of 1901, all of which were replaced by s. 91 of the Patents and Designs Act, 1907 (7 Edw. 7, c. 29), as amended by the Patents and Designs Act, 1914 (4 & 5 Geo. 5,

(*k*) The "rights" must be shown to be direct, subsisting, and pecuniary. Cf. *Hanfstaengl Art Publishing Co. v. Holloway*, [1893] 2 Q. B. 1.

c. 18), and the Patents and Designs Act, 1919 (9 & 10 Geo. 5, c. 80). Section 91 empowers the Crown to make arrangements with the Governments of foreign States for the mutual protection of inventions, or designs, or trade marks. When such a convention has been entered into, any person (l), or his legal representative or assignee, who has applied for protection for any invention, design, or trade mark in any such foreign State, shall be entitled to apply for and obtain the same protection by patent or registration in the United Kingdom, provided he makes application here within twelve months after his foreign application (m). An applicant will not be prejudiced in his right to a patent by publication within the United Kingdom during the said twelve months (n). The application, which must be accompanied by a complete specification and certified copies of the foreign specifications and drawings (o), is made in the same manner as an ordinary application under the Act. If the complete specification left with the application is not accepted within twelve months from the date of the first foreign application, it is to be open to public inspection at the end of that period (p).

The States with whom convention arrangements have been made by Order in Council in pursuance of this Act are the original parties to the International Convention for the Protection of Industrial Property, held at Paris in 1883, and amended by the Washington Convention of 1911 (q), and other States with whom subsequent conventions have been made. The following is a list of the countries :

Australia, Austria-Hungary, Belgium, Brazil, Ceylon, Cuba, Denmark, Dominican Republic, France (with Algeria and Colonies), Germany, Great Britain, Italy, Japan, Mexico, Netherlands (including Dutch East Indies and Surinam and Curaçao), New Zealand, Norway, Paraguay, Portugal, Santo Domingo, Servia, Spain, Sweden, Switzerland, Trinidad and Tobago, Tunis, United States, Uruguay.

For designs and trade marks only.—Ecuador, Greece, Roumania.

By Art. 286 of the Treaty of Versailles, 1919, the Convention of 1883 for the protection of industrial property as revised at Washington in 1911, has again come into force as from the coming

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(l) "Person" includes corporation; cf. *Re Carez's Application for a Patent* (1889), 6 R. P. C. 552; *Re Société Anonyme du Générateur du Temple's Application for a Patent* (1895), 13 R. P. C. 54, 56.

(m) Patents and Designs Act, 1907, s. 91 (1) (a). Cf. 46 & 47 Vict. c. 57, s. 103, as amended by 48 & 49 Vict. c. 63, s. 6.

(n) Patents and Designs Act, 1907, s. 91 (2).

(o) Patents Rules, 1908, rr. 15, 16.

(p) S. 91 (3) (a); Patents Rules, 1908, r. 17.

(q) Parl. pap.

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into effect of the Treaty of Versailles, in so far as it is not affected or modified by the exceptions or restrictions resulting thereupon.

By Order in Council these conventions now apply by St. R. & O. to Czecho-Slovakia, 1920, No. 575; Roumania, 1920, No. 1992; Serb-Croat-Slovene State, 1921, No. 267; Bulgaria, 1921, No. 1213; Finland, 1921, No. 1673.

The United States was not a party to these instruments, but by the Nolan Act of 3rd March, 1921, took substantially all the powers of granting extensions specified in the Peace Treaty, with substantially the same conditions attached thereto. In consequence of this Act a mutual understanding was reached between the United States and Great Britain to the effect that each country should treat applications from the nationals of the other in a generous spirit and substantially on the basis of the Peace Treaty: see *In re Armstrong's Application* (1922), 39 R. P. C. 176.

Colonies.—Inasmuch as British letters patent have no operation beyond the United Kingdom, the colonial possessions and dominions beyond the seas are for patent purposes in the position of foreign States. By s. 91 (5) of the Act of 1907 (*r*), when satisfactory provision is made by the Legislature of any British possession for the protection of inventions, designs, and trade marks patented or registered in this country, His Majesty may, by Order in Council, apply the provisions of this section to that possession, with such variations or additions, if any, as may be stated in the Order.

S. 91 of the Act of 1907 applies to the Union of South Africa, 1918, No. 816; British India, 1920, No. 2034; Luxemburg, 1922, No. 814; Canada, 1923, No. 1226.

No rule exists which requires that the applicant for a British patent should be British by nationality or domicile, whether his application is for a British patent in the first instance, or under s. 91 of the Act of 1907, after he has already obtained like protection in his own country. But in the latter case, the application must be made and signed personally, and not by an agent (*s*).

A British patent will not be granted where there has been prior publication in any part of the United Kingdom, including Scotland and the Isle of Man (*t*); but an invention used and published abroad may be imported into the United Kingdom, and the importer is entitled to a grant of letters patent as the "true and first

(*r*) Cf. s. 104 of the Patents Act, 1883.

(*s*) *Re Carez's Application for a Patent* (1889) 6 R. P. C. 552; *Re Société Anonyme du Générateur du Temple's Application for a Patent* (1895), 13 R. P. C. 54. Cf. Patents Rules, 1908, r. 15.

(*t*) *Roebuck v. Stirling* (1774), 1 W. P. C. 45; *Brown v. Annandale* (1842), 8 Cl. & F. 437 (where prior user in England was held fatal to the validity of a Scotch patent).

inventor," whatever the means by which he has obtained the invention (*u*). But a communication in England by one British subject to another of an invention gives the receiver no right to apply for letters patent as the introducer or inventor (*x*).

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It was held by Roche, J., in *The Molière* (1924), 41 T. L. R. 154, that the Court of Admiralty has no jurisdiction to entertain an action *in rem* for loss of life and the Admiralty rules as to division of loss have no application to such a claim, and s. 3 of the Maritime Conventions Act, 1911, which provides for contribution between the owners of wrongdoing vessels in respect of (*inter alia*) damages for loss of life or personal injuries only applies to damages recoverable by action and not to claims for compensation arising out of some statute and independently of fault on the part of the shipowner.

(*u*) *Re Edmunds' Patent* (1886), Griffin, 283; *Higgin's Case* (1891), 9 R. P. C. 74. Cf. *Rolls v. Isaacs* (1881), 19 Ch. D. 268 (where prior publication in Natal was held to be no bar to the grant of patent rights for an invention unknown in England).

(*x*) *Marsden v. Savile Foundry Co.* (1877), L. R. 3 Ex. 202.

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*Crimes—
Jurisdiction.*

NOTE ON CRIMES.

The subject of crimes does not, strictly speaking, fall within the limits of this work; but it appears convenient to state here the general rules of English law affecting criminal jurisdiction.

Crime is local in its character; that is, it is an offence against the law of the State where it is committed. It may also be, and often is, an offence against the law of the State to which the offender owes allegiance (*y*). But except in these two cases, crime receives no legal recognition; and it is for this reason that actions on foreign judgments for penalties of a public or criminal character are not entertained (*z*).

It is plainly competent for any State to prescribe the cases in which it will exercise control for criminal purposes over its subjects abroad. And with regard to the high seas, which are not within the limits of any State, the rule as to the locality of crime has no application. It has been already incidentally stated that the English Admiralty has from time immemorial claimed jurisdiction in respect of crimes committed on board British ships on the high seas, including under that phrase all waters where great ships go and lie afloat, whether moored to the land or not (*a*). And it makes no difference whether the offender be a member of the crew or a stranger (*b*). This jurisdiction is now transferred to and exercisable by the Central Criminal Court (*c*).

With regard to acts of a criminal nature committed at sea not on board British ships, the Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict. c. 73), declares and enacts the principle that the British Crown has jurisdiction over the open seas "to such a distance as is necessary for the defence and security" of its dominions. Writers on public international law, following the maxim, "*Terræ dominium finitur ubi finitur armorum vis*," have very generally adopted the three-mile limit. It is obvious that this limit, fixed when the range of heavy guns was much less than at the present day, is hardly proportionate to the extended resources of modern scientific warfare. The Territorial Waters Jurisdiction Act, however, though expressly providing that nothing in it shall be construed to be in derogation of any rightful jurisdiction of the Crown under the law of nations, adopts the limit of one marine league from low-water mark in order to define the phrase "territorial waters," and enacts that any offence committed within that line, whether by a subject or not, is an offence within the jurisdiction of the Admiralty, although it may have been committed on board or by means of a foreign ship (*d*). By s. 3 of the same Act it is further enacted that persons who are not subjects of the British Crown shall not be proceeded against without the consent and certificate

(*y*) *Macleod v. A.-G. for New South Wales* (1891), 60 L. J. P. C. 55.

(*z*) *Huntington v. Attrill*, [1893] A. C. 150, 156.

(*a*) *Vide ante*, p. 516, and cases cited in *Reg. v. Anderson*, and *Reg. v. Carr, infra*.

(*b*) *Reg. v. Anderson* (1868), 10 App. Cas. 59; *Reg. v. Carr* (1882), 10 Q. B. 76.

(*c*) 4 & 5 Will. IV. c. 36, s. 22.

(*d*) *Cf. Mortensen v. Peters* (1906), 8 F. (Just. Cas.) 93.

of one of her Majesty's principal Secretaries of State. This Act was passed in consequence, and in order to remedy the effects, of the decision of the majority of the judges in the case of *Reg. v. Keyn* (e). In that case it was held, by seven judges to six, that there was no jurisdiction to proceed against a foreigner for manslaughter caused by negligent navigation of a foreign vessel within the three-mile limit; but "the opinion of the minority in *The Franconia Case* has been since not only enacted, but declared by Parliament to have been the law" (f). The case must therefore be taken as having been wrongly decided; but, as a storehouse of learning on the subject, it is still of the highest value.

The limit of the jurisdiction of the Admiralty, however, and *a fortiori* the limit under the Territorial Waters Jurisdiction Act, becomes immaterial when the crime in question is committed by one of the crew of any British vessel. S. 267 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), enacts that "all offences against property or person committed in or at any place, either ashore or afloat, out of her Majesty's dominions by any master, seaman, or apprentice who, at the time when the offence is committed or within three months previously, has been employed in any British ship, shall be deemed to be offences of the same nature respectively, and be liable to the same punishments respectively, and be inquired of, heard, tried, determined, and adjudged in the same manner and by the same Courts and in the same places, as if such offences had been committed within the jurisdiction of the Admiralty of England," and provision is there made for the necessary procedure and expenses. S. 21 of the amending Act of 1855 (18 & 19 Vict. c. 91) enacts that "if any person, being a British subject, charged with having committed any crime or offence on board any British ship on the high seas, or in any foreign port or harbour; or if any person, not being a British subject, charged with having committed any crime or offence on board any British ship on the high seas, is proved within the jurisdiction of any Court of Justice in her Majesty's dominions which would have had cognisance of such crimes or offences if committed within the limits of its ordinary jurisdiction," such Court shall have power to hear and try the case as if such crime or offence had been committed within such limits. And s. 11 of the amending Act of 1867 (30 & 31 Vict. c. 124) enacts that "if any British subject commits any crime or offence on board any British ship or on board any foreign ship to which he does not belong, any Court of justice in her Majesty's dominions which would have had cognisance of such crime or offence if committed on board a British ship within the limits of the ordinary jurisdiction of such Court shall have jurisdiction to hear and determine the case as if such crime or offence had been committed as last aforesaid."

The effect of these sections seems to be that, whereas by the Common Law offences committed by any person on board British ships on the high seas are cognisable, jurisdiction is also assumed over the crews of British ships committing offences abroad, though not on board their vessels, and is further retained over them for a period of three months after they have ceased to be employed as members of such crews. Moreover, with respect to the Common Law jurisdiction as to offences committed on board British ships, the jurisdiction can be exercised by any (otherwise) competent Court in her Majesty's dominions (except in the

Crimes by
subjects, &c.,
17 & 18 Vict.
c. 104, s. 267.

18 & 19 Vict.
c. 91, s. 21.

30 & 31 Vict.
c. 124, s. 11.

(e) *R. v. Keyn* (1876), 2 Ex. D. 63; *The Franconia* (1877), 2 P. D. 163.

(f) Per Lord Coleridge, C.J., in *Reg. v. Dudley* (1884), 14 Q. B. D. 273.

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Murder and
manslaughter
by subjects—
24 & 25 Vict.
c. 100, ss. 9,
10.

case of a crime committed on board a British ship in a foreign port or harbour by a non-British subject, when the Central Criminal Court would alone have jurisdiction, as in *Reg. v. Carr*). And in the exceptional case of an offence by a British subject on board a foreign ship to which he does not belong, the same jurisdiction to any British Court is given.

In addition to these provisions with reference to offences committed by the crews of or on board vessels, jurisdiction is specially assumed over all British subjects committing the crimes of murder or manslaughter on land out of British dominions, by the statute 24 & 25 Vict. c. 100, s. 9; and it is enacted that such offences may be dealt with and punished in any county or place in England or Ireland in which the person charged shall be apprehended or be in custody, in the same manner as if the offence had been actually committed in such county or place. S. 10 of the same Act provides for the case of homicide resulting from a blow or hurt inflicted in England or Ireland where the actual death takes place elsewhere. The converse case of a death in England from a blow or hurt inflicted elsewhere is similarly provided for.

By statute 35 Hen. 8, c. 2, treason committed by a British subject, whether within or without the jurisdiction, is cognisable by English Courts (g).

Bigamy—
24 & 25 Vict.
c. 100, s. 57.

The offence of bigamy is another crime which English law assumes jurisdiction to deal with by virtue of its right to control the person, wherever the actual ceremony constituting the second marriage may have taken place. S. 57 of the Act just referred to enacts that a second marriage during the life of the former husband or wife shall be a felony, whether the second marriage shall have taken place in England, or Ireland, or elsewhere; and may be dealt with and punished in any county or place where the offender may be apprehended or be in custody. The proviso to the section, however, confines its operation, in cases where the second marriage has been contracted abroad, to British subjects (h).

Statutory
extension of
jurisdiction.

By the Explosive Substances Act, 1883 (46 & 47 Vict. c. 3), offences under sections 3 and 5 are extended to acts done by British subjects, within or without the jurisdiction.

The principle on which these statutes rests is of course that the Crown has the right to control and punish its own subjects without reference to local jurisdiction or rules of venue. By the English Common Law, a crime or offence is a wrongful act "against the peace" of the Sovereign; which implies that it must have been committed within the territorial dominions, for which "the King's peace" is a metaphorical synonym (i).

(g) And see *R. v. Lynch*, [1903] 1 K. B. 444, where a British subject was tried in London for treason committed in South Africa; and *R. v. Casement*, [1917] 1 K. B. 98; 12 Cr. App. Cas. 99, where a British subject was tried in London for treason committed in Germany.

(h) *The King v. Earl Russell* (1901), H. L. In *Macleod v. A.-G. of N. S. Wales* (1891), 60 L. J. P. C. 55, a Colonial Statute dealing with the same offence was construed with the more restricted meaning.

(i) By the Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), consolidating the earlier Acts, the Crown is empowered by Order in Council to assume and exercise jurisdiction in foreign countries, either by treaty or capitulation from the foreign Government, or (in the case of countries subject to no organised Government capable of conferring jurisdiction) under the Act itself over British subjects only. Under this Act a number of Orders in Council have been made,

assuming (*inter alia*) criminal jurisdiction in such foreign countries. The same statute (s. 5) authorises the Crown to direct that certain enactments (mentioned in the schedule) shall be extended to any foreign country in which the Crown has assumed jurisdiction. These enactments are as follows:

The Admiralty Offences (Colonial) Acts, 1849 and 1860 (12 & 13 Vict. c. 96; 23 & 24 Vict. c. 122).

The Evidence Act (1851), 14 & 15 Vict. c. 99, ss. 7, 11.

The Foreign Tribunals Evidence Act (1856), 19 & 20 Vict. c. 113.

The Evidence by Commission Act (1859), 22 Vict. c. 20.

The British Law Ascertainment Act (1859), 22 & 23 Vict. c. 63.

The Foreign Law Ascertainment Act (1861), 24 & 25 Vict. c. 11.

The Merchant Shipping Act (1854), 17 & 18 Vict. c. 104, Part X.

The Merchant Shipping Act (1867), 30 & 31 Vict. c. 124, s. 11.

The Fugitive Offenders Act (1881), 44 & 45 Vict. c. 69.

The Evidence by Commission Act (1885), 48 & 49 Vict. c. 74.

The Conveyancing (Scotland) Act (1874), 37 & 38 Vict. c. 94, s. 51.

By the Foreign Jurisdiction Acts (1890 and 1913), 3 & 4 Geo. 5, c. 16, His Majesty may by Order in Council extend additional enactments to any foreign country where His Majesty has jurisdiction.

The Orders in Council which have been made up to and including 1899 under this statute will be found indexed in detail in the Index to the Statutory Rules and Orders, 1899, p. 272. Those subsequent to 1899 will be found in the Statutory Rules and Orders for 1900 (pp. 269-282), 1901 (99-166), and 1902 (120-145). They include Africa (South, West and East), China, Corea, Cyprus, Egypt, Gambia, Gold Coast, Japan, Lagos, Morocco, Muscat, Pacific Ocean, Persia, Siam, Sierra Leone, Somaliland, Tunis, Turkey, and Zanzibar. These are in the index for 1899. In 1900, Orders in Council were made relating to Brunei, China, Corea, Cyprus, Rhodesia, Siam, and Somaliland (St. R. & O. 1900, pp. 269-282). In 1901, Orders relating to East Africa, South Africa (Rhodesia), West Africa, Brunei, China, and Persia (pp. 99-166). In 1902, Orders relating to British Africa (Central, West, and East), China, Cyprus, and India (pp. 120-145). In 1904, to China and Corea (p. 193); in 1905, to Turkey (p. 742); in 1906, to Zanzibar and Siam; in 1907, to China, Corea, and the Persian Coast; in 1908, to Zanzibar; in 1910, to Turkey; in 1913, to Abyssinia (p. 177); in 1917, to Bahrein (p. 374); in 1920, to China (p. 719); in 1910 (p. 140), and 1915 (p. 269), to Egypt; in 1915, to Muscat (p. 280); in 1922, to Persian Coast and Islands (p. 392).

In the mandated territories administered by Great Britain, the following Orders in Council have been issued, applying to The Cameroons, 1923 (p. 325); Palestine, 1922 (p. 362), 1923 (p. 339); Tanganyika Territory, 1920 (p. 685); Togoland, 1923 (p. 330).

As to the powers of detention which a Governor of a protectorate may exercise under Orders in Council made under the Foreign Jurisdiction Act, 1890 (*supra*). see *R. v. Crewe; ex parte Sekgome*, [1910] 2 K. B. 576.

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ACTS.

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Part IV.—PROCEDURE.

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PROCEDURE.

CHAPTER X.

CAP. X.

PROCEDURE GENERALLY, AND EVIDENCE.

No principle of private international law is more certain in itself than the rule that the forms of remedies and modes of proceeding are regulated solely by the law of the place where the action is brought (*a*). The only difficulty in the application of the general rule is to decide where formalities end and essentials begin. A law which will allow a remedy to be obtained only in a particular manner, or which imposes an impossible formal condition upon the only mode of procedure applicable to the case, does in effect, though indirectly, govern the right of action itself. A striking illustration of this is seen in the application of the Statute of Frauds to all contracts sued on in an English court. It is a general principle that all questions relating to the admissibility and effect of evidence depend upon the *lex fori*, as matters of procedure (*b*); and the Statute of Frauds, which requires that certain contracts shall be evidenced by writing to support an action upon them, has been held to come within this rule (*c*). The result is, of course, to render a contract which may have been perfectly good according to the law of the place where it was made or was to be performed, practically invalid in an English Court. The vexed question of the applicability of the English Statute of Limitations to an action brought on a foreign contract affords another example of the difficulty referred to. The right of action, so far as an English Court is concerned, is

(*a*) *Don v. Lippmann* (1837), 5 Cl. & F. 1, 13; *British Linen Co. v. Drummond* (1830), 10 B. & C. 903; *De la Vega v. Vianna* (1830), 1 B. & Ad. 284; *Huber v. Steiner* (1835), 2 Scott, 304; *Ferguson v. Fyffe* (1841), 8 Cl. & F. 121; *General Steam Navigation Co. v. Guillou* (1843), 11 M. & W. 277.

(*b*) *Bain v. Whitehaven, &c., Ry. Co.* (1850), 3 H. L. C. 1.

(*c*) *Leroux v. Brown* (1852), 12 C. B. 801 (where a contract valid by French law could not be enforced in England because of the absence of a note or memorandum as required by the Statute of Frauds); *Acebal v. Levy* (1834), 10 Bing. 376; *supra*, p. 391. The Gaming Acts of 1845 and 1892, in so far as they enact that no suit shall be brought to recover any sum of money alleged to have been won upon any wager are also statutes affecting procedure: cf. *Moulis v. Owen*, [1907] 1 K. B. 746, C. A., at p. 753, per Collins, M.R.; and see also *Saxby v. Fulton* (1908), 24 T. L. R. 856. But the Moneylenders Act, 1900, which requires the application of certain rules "where proceedings are taken in any court," is not a rule of procedure: *Schrichand & Co. v. Lacon* (1906), 22 T. L. R. 245, per Ridley, J.

practically extinguished by an enactment which after a certain time prevents its enforcement; but this incidental effect of a law which professes merely to prescribe the terms and mode of the remedy does not prevent the *lex fori* from exerting its full operation.

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The shortest way of stating the general rule is, that the remedy is to be enforced according to the *lex fori* (d). It is perhaps scarcely correct to say that the parties must be taken to have contemplated the possibility of enforcing the obligation existing between them in any country, a fiction which would obviously be altogether incapable of application to actions based on torts; but it is at any rate clear that the parties who have recourse to a tribunal to enforce any obligation, whether arising from tort or contract, must, as Lord Tenterden said in *De la Vega v. Vianna* (1830), 1 B. & Ad., at p. 288, take the law which regulates the remedy they are seeking as they find it. The object of procedure, understanding by procedure the process by which a remedy is to be obtained, includes the determination of the following elements:—(i.) the name in which and against which the action is to be brought; (ii.) the time within which it must be brought; (iii.) mode of suing and enforcing process; (iv.) the evidence admissible and necessary to support an action; (v.) the recognition and enforcement of foreign judgments. It will be convenient to consider how far the *lex fori* is supreme with respect to each of these subdivisions.

Remedies
governed by
lex fori.

(i.) PARTIES TO THE ACTION.

(a) *Name in which it must be brought.*—It is said by Story, Title to sue. that it has been held that the inquiry, in whose name the action is to be brought, belongs not so much to the right and merit of the claim, as to the form of the remedy (§ 565). So far as it belongs to the form of the remedy alone, and does not alter the ultimate direction in which the benefit of the remedy is to flow, the *lex fori* has been held entitled to control it. Thus, before the adoption by the Judicature Acts of the equitable rule as to the assignment of a *chose in action*, it was held that the assignee of a *chose in action* could not sue in England on it in his own name, although the assignment might have been made in a country where its validity was recognised by the law (e). The point did not exactly arise in *Trimbey v.*

(d) Per Lord Brougham in *Don v. Lippmann* (1837), 5 Cl. & F. 1, 13. And the same principle has been applied to the International Copyright Acts, *Baschet v. London Ill. Standard Co.* (1900), 69 L. J. Ch. 35. Cf. *De la Vega v. Vianna* (1830), 1 B. & Ad. 284; *Hansen v. Dixon* (1906), 96 L. T. 32.

(e) *Wolff v. Oxholme* (1817), 6 M. & S. 92, per Lord Ellenborough, C.J., at p. 99; *Jeffery v. McTaggart*, *ibid.*, 126; *Innes v. Dunlop* (1800), 8 T. R. 595;

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Parties.
—Foreign
assignees.

Vignier (f) and the cognate cases, in which the question has been as to the law which was to govern the sufficiency of the assignment, the assignee, if the assignment was valid by the proper law, being admittedly entitled to sue in his own name by the *lex fori* and the *lex contractus* alike. There are nevertheless expressions in the judgment in *Trimbey v. Vignier* which throw some doubt on the theory that the name in which the action is to be brought is a matter for the *lex fori* to determine at all. There is, no doubt, considerable difficulty in distinguishing the name in which the action is to be brought from the title on which it depends (g); the latter belonging to the province, not of the *lex fori*, but of the law which created it. Thus it has been pointed out with regard to bills of exchange and promissory notes, that their assignability, upon which the right of the holder to sue in his own name depends, must be measured by the law which governs the nature and extent of the obligation of the contract (*supra*, p. 469), and every promise or undertaking must be regarded as having the same inherent force. Consequently, if a *chose in action* is in its inception assignable, and has been rightly assigned, the assignee's title will be acknowledged as complete without reference to the *lex fori* in all courts (h). It has been similarly shown that the title conferred on the assignees by a foreign bankruptcy assignment is accorded a like recognition in an English court (*supra*, p. 345). And where two out of three syndics of a French bankrupt sued in England on a *chose in action* of the bankrupt without joining the third, it was held that they were justified in doing so by proof that the French law would have allowed the same to be done. "The property in the effects of the bankrupt," said Parke, B., "does not appear to be absolutely transferred to these syndics in the way that those of a bankrupt are in this country; but that the syndics act as mandatories or agents for the creditors, the whole three, or any two or one of them, having the power to sue for and recover the debts in their own names. This is a peculiar right of action created by the law of that country, and we think it may be by the comity of nations enforced in this, as much as

Folliott v. Ogden (1789), 1 H. Bl. 135. These cases are, of course, merely illustrations of the general principle relative to the parties to an action and the *lex fori*. Cf., further, *Barber v. Mexican Land and Colonisation Co., Ltd.* (1900), 16 T. L. R. 127, where an order of an American Court, authorising the plaintiff to sue on a judgment obtained abroad against a company, was held *ultra vires* so far as it purported to confer a right to sue in England.

(f) (1834), 1 Bing. N. C. 151; *Bradlaugh v. De Rin* (1868), L. R. 5 C. P. 473; *Lebel v. Tucker* (1867), L. R. 3 Q. B. 77; *supra*, p. 465.

(g) *Westlake*, Priv. Int. Law (1922), § 342, p. 404.

(h) *Bradlaugh v. De Rin* (1868), L. R. 5 C. P. 473; *Lebel v. Tucker* (1867), L. R. 3 Q. B. 77; *Trimbey v. Vignier* (1834), 1 Bing. N. C. 151; *O'Callaghan v. Thomond* (1810), 3 Taunt. 81; *Innes v. Dunlop* (1800), 8 T. R. 595; *De la Chaumette v. Bank of England* (1831), 2 B. & Ad. 385.

the right of foreign assignees or curators, or foreign corporations, appointed or created in a different way from that which the law of this country requires" (i). There can be no doubt that this is a strong authority against regarding the determination of the name in which an action is to be brought as one of procedure at all, and that it is difficult in the face of such a decision to distinguish any such question from the general one of title, on which the *lex fori* has no claim to make itself heard.

The title of an administrator or executor under a foreign grant to enforce the *choses in action* of the deceased in England is not recognised, as has been already said (k), until administration is taken out here. This is, however, for a different reason. A foreign administration is not regarded as transferring or assigning any movable property except that actually situate within the jurisdiction of the law which grants it, and a foreign administrator who has not obtained an English grant has consequently no title at all to the *choses in action* of the deceased here. An assignment *inter vivos*, on the contrary, is intended to operate all the world over, and claims universal recognition on that footing; while an assignment by law or bankruptcy is acknowledged by international comity, as has been already pointed out, as having a similar effect. The right of a husband to sue in his wife's name with respect to the movables acquired by him through her is referred, upon the same principle, to the law of the matrimonial domicile; to which the intention of the parties must also be presumed to have been directed (l). So when a husband and wife are domiciled in a country where the wife has no equity to a settlement, an English Court will order payment of the wife's legacy to an assignee of the husband (m)—a case not strictly pertinent to the present subject, but which shows in a strong light the inability of the *lex fori* to interfere with any question of title. So it appears that a *feme covert*, who carries on business in a country where the law permits her to do so as a sole trader, may sue here in respect of transactions

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Foreign
administra-
tors.Married
woman.

(i) *Alivon v. Furnival* (1834), 1 C. M. & R. 277, 296; 4 Tyrwhitt, 751. For cases as to trustees in bankruptcy suing in England, cf. *Re Hayward, Hayward v. Hayward*, [1897] 1 Ch. 905 (in which a trustee in a foreign bankruptcy was not entitled to sue where the bankrupt was domiciled in England at the date of the bankruptcy); *Re Davidson's Settlement Trusts* (1873), L. R. 15 Eq. 383; *Re Lawson's Trusts*, [1896] 1 Ch. 175. With regard to the title of a trustee under a foreign assignment, cf. *Dulaney v. Merry & Son*, [1901] 1 K. B. 536.

(k) *Supra*, p. 318. But the administrator of the *forum* of the domicile can recover from a local or limited administrator any balance in his hands of the personal estate collected by him: *Eames v. Hacon* (1880), 16 Ch. D. 407; S. C. on appeal, 18 Ch. D. 347; *De la Viesca v. Lubbock* (1840), 10 Sim. 629; *Enochin v. Wylie* (1862), 10 H. L. C. 1; *supra*, p. 318.

(l) *Dues v. Smith* (1822), Jacob, 544; *Sawer v. Shute* (1792), 1 Anst. 63; *Campbell v. French* (1797), 3 Ves. 321.

(m) *McCormick v. Garnett* (1854), 5 De G. M. & G. 278.

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entered into in that character; but that husband and wife cannot sue here as partners in trade, though that trade was carried on under a law which recognised such partnership (*n*). The distinction is perhaps a shadowy one, but seems to be founded on the view that the right of a *feme covert* to acquire property and sue for it in any court must be decided by the law under which she lives, but that her right to sue jointly with her husband as his partner involves a question of the misjoinder of parties, which is properly a matter of procedure for the *lex fori*. It may be remarked, in reference to this case, that the custom of the City of London which allows a *feme covert* to carry on business as a sole trader in the City does not authorise her to sue as such trader in any but the City of London courts (*o*); so that it does not really purport to give her a title for general purposes at all.

Security for
costs.

According to the English practice, plaintiffs resident abroad are ordered to give security for costs (*p*). But if there are any co-plaintiffs resident in England, security will not be ordered (*q*). The test is "ordinary residence within the jurisdiction"; and merely temporary residence will not suffice (*r*). The rule applies not only to plaintiffs, but to other parties in the position of a claimant or plaintiff, *e.g.*, in interpleader (*s*); and to other persons who voluntarily intervene in an action (*t*). But if the residence abroad is in an official capacity in the public service, security will not be ordered (*u*). Security is not ordered merely because the plaintiff is about to leave the kingdom (*x*), or happens to be abroad (*y*). The rule requiring security is not applied if the foreign resident affected has substantial property, real or personal, within the jurisdiction, which will be available for costs (*z*). Security is not ordered if the defendant has money of the plaintiff in his hands (*a*), or admits the claim (*b*),

(*n*) *Cosio v. De Bernales* (1824), 1 C. & P. 266; Ry. & Moo. 102.

(*o*) *Beard v. Webb* (1800), 2 B. & P. 98; 1 C. & P. 267, n.

(*p*) *Crozat v. Brogden*, [1894] 2 Q. B. 30; *Rep. of Costa Rica v. Erlanger* (1876), 3 Ch. D. 62; *Re Pretoria-Pietersburg Ry. Co.* (No. 2), [1904] 2 Ch. 359; *Appollinaris Co. v. Wilson* (1886), 31 Ch. D. 632; *Re Milward & Co.*, [1900] 1 Ch. 405.

(*q*) *Winthrop v. Royal Exch. Co.* (1755), 1 Dick. 282; *D'Hormusjee v. Grey* (1882), 10 Q. B. D. 13; *The Carnarvon Castle* (1878), 38 L. T. 736, C. A.

(*r*) Ord. 65, 2, 6 (*a*).

(*s*) *In re Milward & Co.*, [1900] 1 Ch. 405.

(*t*) *Appollinaris Co. v. Wilson* (1886), 31 Ch. D. 632, C. A.; *In re La Compagnie Générale, etc.*, [1893] 3 Ch. 451.

(*u*) *Colebrook v. Jones* (1751), 1 Dick. 154; *Evelyn v. Chippendale* (1839), 9 Sim. 497; *Nugent v. Harcourt* (1834), 2 Dowl. P. C. 578.

(*x*) *Adams v. Colethurst* (1794), 2 Anst. 552.

(*y*) *Hoby v. Hitchcock* (1800), 5 Ves. 699; *Green v. Charnock* (1791), 1 Ves. 396.

(*z*) *Ebrard v. Gassier* (1884), 28 Ch. D. 232; *Re Apollinaris Co.*, [1891] 1 Ch. 1; *Redondo v. Chaytor* (1879), 4 Q. B. D. 457.

(*a*) *Crozat v. Brogden*, *supra*, at p. 36; *Duffy v. Joyce* (1890), 25 L. R. Ir. 42.

(*b*) *De St. Martin v. Davis & Co.* (1884), W. N. 86.

or if the plaintiff has an unsatisfied judgment against the defendant (c). Foreign ambassadors are not ordered to give security, but the exemption does not also apply to their servants (d). Residence in Scotland or Ireland is not foreign residence within the meaning of this rule, judgment in the English Courts being enforceable in Scotland and Ireland (e).

(b) *Name against which the Action is to be brought.*—It is quite clear that no person can be made liable by the *lex fori*, as an incident of procedure, who would not have been exposed to liability by the proper law to govern the act or contract in respect of which he is sued, and his connection with it. Thus in *General Steam Navigation Co. v. Guillou* (1843), 11 M. & W. 877, the defendant, who was sued for injury done to the plaintiff's ship on the high seas by a vessel of which he was alleged to be the owner, pleaded that the real owners of the vessel which caused the collision were a French society or company, of which he was a shareholder and acting director, and that, by the law of France, the defendant was not responsible for or liable to be sued or impleaded individually, or in his own name or person, in respect of the causes of action alleged, but that the said company alone, by their said style or title, were responsible for and liable to be sued and impleaded for the said causes of action. It is not easy to see how this plea could have been construed as anything but a denial that the defendant was personally or individually liable at all by French law, although the Court of Exchequer were equally divided on this question; but the true principle by which such cases are to be determined is no doubt correctly indicated in the judgment. "If the defendant," said Parke, B., "was not liable for the acts of the master by that law which is to govern the case, he has a good defence to the action. For the defendant, it is contended that the plea means to aver that by the law of France he was not liable for those acts, but that a body established by the French law, and analogous to an English corporation, were the proprietors of the vessel, and alone liable for the acts of the master. . . . If such be the true construction of the plea, we are all strongly inclined to think that there is a good defence to the action. On the other hand, the plaintiff contends that the plea only means that in the French court the mode of proceeding would be to sue the defendant jointly with the other shareholders of the company under the name of their

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Parties.

Liability to
be sued.

(c) *Bristowe v. Needham* (1842), 4 Man. & G. 906; *Re Contract and Agency Corporation* (1887), 57 L. J. Ch. 5.

(d) *Goodwin v. Archer* (1727), 2 P. Wms. 4f2; *De Montellano v. Christin* (1815), 5 M. & S. 503.

(e) *Judicature Act*, 1873, s. 76; *Judgments Ext. Act*, 1868. Cf. *Re Howe Machine Co. (Fontaine's Case)* (1889), 41 Ch. D. 118, C. A.; *Re Queensland Mercantile Agency Co.* (1891), 61 L. J. Ch. 48.

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association; and if this be the true construction of the plea, we all concur in the opinion that the plea is bad; for it is well established that the forms of remedies and modes of proceeding are regulated solely by the law of the place where the action is instituted—the *lex fori*; and it is no objection to a suit instituted in proper form here, that it would have been instituted in a different form in the court of the country where the cause of action arose, or to which the defendant belongs.” The distinction intended appears to be, that the defendant, if not personally liable at all by the French law, could not be made so by the *lex fori*; but that if in France he was under a joint personal liability with the other members of the association, the fact that they were not joined as defendants would be immaterial, as relating to a question of procedure. This was the principle afterwards adopted in *Bullock v. Caird* (1875), 10 Q. B. 278, where the action was brought against a single defendant, for a breach of an agreement entered into between the plaintiffs and C. & Co.; and the defendant pleaded that there was a trading partnership or firm, domiciled and carrying on business in Scotland by the name of C. & Co., of which he was a member; that, by the Scots law, the firm was a distinct person from any or the whole of the individual members, and was capable of maintaining the relation of debtor and creditor separate and distinct from the obligations of the partners as individuals, and of holding property, and of suing and being sued as a separate person by the name of C. & Co.; that, by the law of Scotland, the defendant, as a partner in the firm, was liable to the plaintiffs for the satisfaction of any judgment which might be obtained against the firm or the whole of the individual members jointly for any breaches of the agreement; and that it was a condition precedent to any individual liability attaching to the defendant, as an individual member of the firm in respect of the agreement, that the firm, as such person, or the whole individual partners jointly, should first have been sued, and that judgment should have been recovered against the firm or the whole of the partners jointly; and that the plaintiffs had not sued the firm or the whole of the partners jointly, or recovered judgment against it or them. It was held, on demurrer, that all the matters stated in the plea were mere matters of procedure, and that the plea was bad, Blackburn, J., saying that the non-joinder of the other members of the firm might be a bar to an action in Scotland, but could only amount in England to a plea in abatement (f). This case was followed and approved by Romer, J., in *In re Doetsch, Matheson v. Ludwig*, [1896] 2

(f) Cf. *Thurburn v. Steward* (1871), 3 P. C. 513.

Ch. 836, where a member of a Spanish firm having died in England, leaving property here, creditors of the firm were allowed to have recourse to his estate here for debts, although the law of Spain would have required that the firm property should be first exhausted. So, in *Bank of Australasia v. Harding* (1880), 9 C. B. 661, where a colonial statute gave a mode of proceeding against a colonial banking company by suing their chairman as nominal defendant, and enforcing the judgment against the property of the members, and judgment had in fact been recovered against the chairman under this provision, it was held that a member of the banking company might nevertheless be sued individually in England. It is true that it was said in the judgment that the colonial statute was merely cumulative, and left all the previous rights and liabilities of the parties untouched; but it is submitted that the decision would have been the same even if the colonial statute had made the recovery of judgment against the chairman a necessary preliminary to fixing any liability on the individual members, such a provision relating merely to procedure, and only indicating the proper mode of bringing home the liability, instead of taking it away altogether. As Lord Campbell expressed it, in *Bank of Australasia v. Nias* (1851), 16 Q. B. 717, such an act imposed no new liability, but only regulated the mode in which the existing liability should be judicially constituted. Such provisions clearly do not affect the right of the creditor to pursue his remedy here in the manner provided by the law of this country; nor will any further special enactment, regulating the manner and conditions of executing a judgment, so obtained against such a nominal defendant, upon the property of the members of the company, have any wider operation beyond the tribunals to which it is immediately addressed (g).

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Parties.

Local
provisions
directory as
to procedure.

(ii.) TIME WITHIN WHICH THE ACTION MUST BE BROUGHT.

Statutes of limitation which bar the remedy, but do not extinguish the right, are regulated and imposed by the *lex fori*. The English statutes of limitations relating to contracts, torts, and movables are of this class. With regard to immovables, the term of prescription depends on the *lex situs*.

Statutes of limitation may be regarded from a double point of view; either as extinguishing and discharging the right of action altogether, or as merely suspending and denying a remedy. Nor has any branch of private international law given rise to greater discussion than the attempt to decide which is in truth their

(g) *Kelsall v. Marshall* (1856), 1 C. B. (N.S.) 241.

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Limitations.
—Statute of
Limitations.

proper character; whether they are, in short, laws which govern the inherent liability of the obligation, or rules of procedure dictated by the *lex fori*, and binding in that *forum* alone. They may, in fact, be either. It is competent to any Legislature to enact that rights of action, not put in force within a certain time, shall be absolutely extinguished; and such an enactment will have a right to claim recognition in any tribunal, whenever a contract made with reference to it as the dominant law shall come in question, *supra*, p. 423. "I should be much inclined to hold," said Cockburn, C.J., in *Harris v. Quine* (1869), 4 Q. B. 653, "that when by the law of the place of contract an action on the contract must be brought within a limited time, the contract ought to be interpreted to mean, 'I will pay on a given day, or within such time as the law of the place of contract can force me to pay.'" That this *dictum* does not express the English law, according to the current of authority, is admitted by the learned judge whose opinion is quoted in the same judgment, but if for the last phrase were substituted the words "within such time as the law of the place of contract provides that any obligation shall remain valid and unextinguished," its authority would be incontrovertible. It has been repeatedly decided that the English law of limitations, with regard to obligations and movables generally, does not go to this extent, but merely fixes a limit within which, in an English Court, the action must be brought; and that foreign statutes of limitation, framed in similar terms, have no larger effect (*h*). The English statute with regard to real property, the Real Property Limitation Act, 1833 (3 & 4 Will. 4. c. 27), amended by the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), on the other hand, does not merely bar the remedy, but extinguishes the right. The *lex situs*, in fact, as to prescription with regard to immovables, exacts universal recognition, whether the action is to recover the land itself, or, for example, an annuity charged upon the land (*i*).

The proposition, however, that the term of limitation of an action on an obligation depends upon the *lex fori*, though

(*h*) *Harris v. Quine* (1869), 38 L. J. Q. B. 331; *Pardo v. Bingham* (1869), 4 Ch. 735; *Ruckmaboye v. Mottichund* (1851), 8 Moo. P. C. 36; *Lopez v. Burslem* (1843), 4 Moo. P. C. 300; *British Linen Co. v. Drummond* (1830), 10 B. & C. 903; *Huber v. Steiner* (1835), 2 Bing. N. C. 202; 2 C. B. 304; *Chitty on Contracts* (17th ed.), p. 112; *Alliance Bank of Simla v. Carey* (1880), 5 C. P. D. 429.

(*i*) *Harris v. Quine* (1869), 4 Q. B., at p. 654; *Pitt v. Dacre* (1876), 3 Ch. D. 295 (where rents and profits of land in Jamaica being administered in the English Court, claims on them were determined according to the law of prescription of the *situs*, from which they had been produced); *Beckford v. Wade* (1805), 17 Ves. 87, P. C.; *Re Peat's Trusts* (1869), 7 Eq. 302 (money arising from the sale of land in India).

apparently well established by the English decisions, and laid down in terms quite free from ambiguity by Story (*k*), has not altogether escaped criticism. Westlake speaks of it as very questionable, and shows an inclination to prefer the view (for which there is considerable authority to be found in Continental writers) that the prescription applicable to a contract depends upon the law of the contract itself, whether that be the *lex loci celebrationis* or *solutionis* (*l*). Westlake adds, that the rule of English law may be justified "on the principle . . . that, although the *lex fori* cannot properly create a new obligation after the one which arose by the original contract or tort has ceased to exist, it may yet regard its statute of limitations as a stringent rule of domestic policy, in obedience to which it may decline to give effect to that obligation even while existing" (*m*).

The distinction thus drawn is perhaps only theoretical, but it may be suggested that the language employed loses sight of the true nature of a statute of limitation. If an obligation has "ceased to exist," the law which effected this result is not a statute of limitation at all, but a statute which discharged the obligation. No writer on this subject has asserted that the discharge of an obligation is effected by the *lex fori*. Statutes of limitation, properly so called, merely prevent a debt or obligation from being enforced by action. There are other ways in which a debt may be said to subsist, though it cannot be put in suit. It may, for example, so subsist as to preserve a lien on the

(*k*) Confl. of Laws, § 576. "In regard to statutes of limitation or prescription of suits, and lapse of time, there is no doubt that they are strictly questions affecting the remedy, and not questions upon the merits. They go *ad litis ordinationem*, and not *ad litis decisionem*, in a just juridical sense. The object of them is to fix certain periods within which all suits shall be brought in the courts of a State, whether they are brought by or against subjects or by or against foreigners. And there can be no just reason, and no sound policy, in allowing higher or more extensive privileges to foreigners than are allowed to subjects. . . . § 557. It has accordingly become a formulary in international jurisprudence, that all suits must be brought within the period fixed by the local law of the country where the suit is brought (*lex fori*), otherwise the suits will be barred, and this rule is as fully recognised in foreign jurisprudence as it is in the common law." And see Dicey, Conflict of Laws (1922), p. 763.

(*l*) The theory that the term of prescription or limitation applicable to a contract depends upon the law applicable to the original contract, or to the law intended by the parties (which amounts to the same thing), is best answered in the words of Lord Brougham. "It is said that the limitation is of the very nature of the contract. First, it is said that the party is bound for a given time, and for a given time only. That is a strained construction of the obligation. The party does not bind himself for a particular period at all, but merely to do something on a certain day. . . . The law does not suppose that he is, at the moment of making the contract, contemplating the period at which he may be freed by lapse of time from performing it. The argument that the limitation is of the nature of the contract supposes that the parties look only to the breach of the agreement. Nothing is more contrary to good faith than such a supposition." (*Don v. Lippmann* (1837), 5 Cl. & F., pp. 1, 15, 16, per Lord Brougham.)

(*m*) Priv. Int. Law (1922), § 238, p. 313.

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goods of the debtor until it is satisfied (n), or so as to cause the right of action to revive by a subsequent promise. A good illustration may be found in the case of *In re Bowes, Strathmore v. Vane* (1889), W. N. 53, where a creditor in an administration suit was allowed to retain, without bringing into hotchpot, the proceeds of a foreign attachment on foreign assets for another debt, being a debt barred by the English Statute of Limitations, but not by the foreign law. It is obvious that for this purpose the English Court must have recognised the existence of the debt in question at a time when its own Statute of Limitations could have prevented its enforcement. It is unnecessary, however, to have recourse to such considerations, inasmuch as the distinct ground upon which the English and certain other statutes of limitation have been held to refer to procedure has been that they do not intend or purport to forbid the cause of action from being put in force, after the specified term, in any courts except their own. They are commands addressed to their own tribunals. Did they purport to be more than this they would cease to be rules of procedure at all, and would absolutely extinguish such rights of action as properly came within their jurisdiction (o).

So far, therefore, at any rate as English tribunals are concerned, it is now established beyond doubt that a law which simply prescribes the time within which a *chose in action* must be put in force relates to procedure alone, and has no validity except in the tribunals to which it belongs and is addressed (p). And in those tribunals it applies to all contracts, wherever made; and to all parties, whatever their nationality or domicile. Thus, in *Pardo v. Bingham* the English Statute of Limitations was held to apply, though the debt was contracted in Venezuela, where the debtor and creditor were both resident at the time and afterwards. "A certain period is fixed by the statute," said Lord Hatherley, "which binds everybody who comes to sue before this *forum*." And where a statute (5 Geo. 4. c. 113, s. 29) provided that no appeal should be allowed from any sentence of any Court of Admiralty unless certain preliminary steps were taken within a given time, it was held that the enactment applied to foreigners as well as to British subjects. It was said, in the judgment, that although the British Parliament had no general power to legislate for foreigners out of the dominions

Foreigners
controlled by
lex fori as to
limitations.

(n) *Spears v. Hartley* (1800), 3 Esp. 81, 82; *Higgins v. Scott* (1888), 2 B. & Ad. 413.

(o) See Westlake, *Priv. Int. Law* (1922), § 238; Story, *Conflict of Laws*, § 576 sq.

(p) *Harris v. Quine* (1869), 4 Q. B. 653; *Pardo v. Bingham* (1869), 4 Ch. 735; *Pitt v. Dacre* (1876), 3 Ch. D. 295, and cases cited on p. 542, n. (a), *supra*.

and beyond the jurisdiction of the Crown, yet it could by statute fix a time within which application must be made for redress to the tribunals over which it had authority; and that this was matter of procedure, which was a law of the *forum*, and bound in that *forum* all mankind, whether foreigners or subjects, plaintiffs or defendants, appellants or respondents (*q*). So exclusively is such a law matter of procedure, that a foreign judgment declaring that a claim is barred by a local statute of limitations is no bar to an action in the tribunals of another State the laws of which fix a longer term of limitation of suit on the original cause of action (*r*). In such a case the maxim "*Nemo bis debet vexari pro eadem causa*" does not apply, the plea upon which the foreign judgment has been given not going to the merit of the cause of action. It will be shown subsequently that this condition must be complied with, in order that a foreign judgment should be set up as a conclusive bar here (*s*). The recent case of *In re Bowes, Strathmore v. Vane* (1889), W. N. 53, is a strong illustration of the principle. In that case an English Court recognised the existence of a debt, which was barred by its own Statute of Limitations, so far as to allow the creditor, who was proving against the same estate for another debt, to retain the proceeds of a foreign attachment for the statute-barred debt without bringing them into hotchpot (*t*).

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It was held in *Alliance Bank of Simla v. Carey* (1880), 5 C. P. D. 249, that when a contract under seal was sued on in England, which had been made in a country where the distinction between specialty and simple contracts was not recognised, the period of limitation applicable to specialties in England was applicable, but Dicey doubts whether this case was rightly decided, see p. 767. It only remains, while on this subject, to advert to a distinction cited with approval from Story in *Huber v. Steiner* (1835), 2 Bing. N. C. 202, between cases where a foreign law of limitation is merely the *lex loci contractus*, and those in which the parties have resided within the jurisdiction of the law during the whole period, so that it has had full operation upon the case. It should, however, be remarked that Story adds the further condition that the law should be one which declares that the claim at the expiration of the statutory period shall become a nullity, and not merely that the remedy shall be barred. Unless such was its

(*q*) *Lopez v. Burslem* (1843), 4 Moo. P. C. 300.

(*r*) *Harris v. Quine* (1869), L. R. 4 Q. B. 653; *Don v. Lippmann* (1837), Cl. & F. 1.

(*s*) *Garcias v. Ricardo* (1845), 14 Sim. 265; *infra*, chap. xi.

(*t*) Cf. the observation of Lord Eldon in *Spears v. Hartley* (1800), 3 Esp. 81, at p. 82: "Though the Statute of Limitations has run against a demand, if the creditor obtains possession of goods on which he has a lien for a general balance, he may hold them for that demand by virtue of the lien."

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nature, it is clear that it would still remain a law of procedure only, and that the additional fact of the parties having resided within its jurisdiction would not give it greater strength or wider operation. No doubt this fact would be an additional reason for admitting the universal validity of the law, if it was a law like the English statute which limits suits relating to immovables (3 & 4 Will. 4, c. 27), which extinguished the right; but it has been already said that such a law is not one of procedure at all, and claims universal recognition without the aid of any additional considerations, such as that the parties have resided for the full period within its jurisdiction.

(iii.) MODE OF SUING AND ENFORCING PROCESS.

No part of the subject is less involved with considerations of the proper respect to be paid to the law which created the right than this; and, accordingly, no part of it is to be referred with less hesitation to the *lex fori* for an authoritative decision. It is, indeed, almost unnecessary to multiply authorities for the proposition that the “forms of remedies and modes of proceeding” are regulated solely by the law of the place where the action is instituted (*u*); but it may be more useful to illustrate it by citing a few examples of its application. How far it applies to the question of the reception of evidence, or of the sufficiency of evidence when received to support an action, will be considered subsequently (*infra*, p. 568); and it has already been shown that the prescription of the time within which an action must be brought is properly regarded as coming under the same general rule. That all questions of priorities between creditors depend upon the *lex fori* was decided, as far as cases of bankruptcy are concerned, by *Ex parte Melbourn*, just cited; and the same rule has more than once been held to be applicable to administrations (*x*). Not only the priority of a creditor, but in some cases his right to prove his debt at all, may in some instances be decided by the *lex fori*. The former rules of English bankruptcy law, for example, which exclude in certain cases a right of double proof against two firms to which the same individual or individuals belong (*y*), have been held to apply to a creditor attempt-

(*u*) *Ferguson v. Fyffe* (1841), 8 Cl. & F. 121; *Trimbey v. Vignier* (1834), 1* Bing. N. C. 151; *General Steam Navigation Co. v. Guillou* (1843), 11 M. & W. 877; *De la Vega v. Vianna* (1830), 1 B. & Ad. 234; *Pardo v. Bingham* (1869), 6 Eq. 485; *Ex parte Melbourn* (1870), 6 Ch. 64.

(*x*) *Pardo v. Bingham*; *Cook v. Gregson* (1854), 2 Drew. 286; *Preston v. Melville* (1840), 8 Cl. & F. 1. So priorities under the Merchant Shipping Act, 1894, s. 167. *The Tagus*, [1903] P. 44.

(*y*) But see now the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 32, which enacts that with respect to the mode of proof, the right of proof by secured and other creditors, the admission and rejection of proofs and the other matters referred to in Schedule II., the rules in that schedule are to be observed.

ing to prove under an English bankruptcy, after proof under what was tantamount to a bankruptcy in the Brazils (z); and the fact that in the case cited the bills which were the subject of the proof had been accepted in England, though mentioned by Turner, L.J., seems immaterial. So an execution creditor who attempts in a foreign court to attach and sell property of a bankrupt firm actually situate in the foreign jurisdiction, may be justified by the *lex fori* in doing so, although the English law would not have permitted it; and the assignees of one of the members of the firm, who has become bankrupt in England, cannot compel him by suit in England to refund what he has recovered (a). It seems difficult, indeed, to suggest any true principle upon which such an interference with the operation of the *lex fori* and *situs* could be warranted, even if the partnership were domiciled and resident in England, and the attached property alone situate within the foreign jurisdiction; though any Court which can give the creditor his full distributive share of the whole partnership property, or withhold it from him, can no doubt practically obtain full recognition for its rules (b). Thus, when a company has in this country been ordered to be wound up, judgment creditors who are in this country and have proved under the winding up will not be allowed to attach, or retain when attached, property in India belonging to the company (c). It would appear, however, that they will be entitled to retain the proceeds of a foreign judgment *in rem*, based upon and declaring the existence of a prior lien in their favour on the assets forming the subject-matter of the judgment (d). The subject has already received some consideration (*supra*, p. 341).

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The rule that set-off, on the other hand, is a mere matter of procedure, not of the substance of the contract between the parties, and that it is consequently dependent on the *lex fori*, is not so clearly established. It is, however, difficult to see in what sense it can be said to be part of the original obligation, that the defendant in an action of contract should be able to defeat part of the claim against him by setting up a perfectly distinct claim of his own against the plaintiff. In such a case, each litigant, plaintiff and defendant, has, strictly speaking, a *chose in action* of his own; and a *chose in action* can of its own nature be enforced

Set-off.

(z) *Ex parte Goldsmid* (1856), 1 De G. & J. 257, 285; *Goldsmid v. Cazenove*, 7 H. L. 785.

(a) *Brickwood v. Miller* (1817), 3 Mer. 279; and see *Stein's Case* (1813), 1 Rose, 462.

(b) *Barker v. Goodair*, 11 Ves. 78; *Dutton v. Morison*, 17 Ves. 201; 1 Rose, 213; *Sill v. Worswick* (1791), 1 H. Bl. 665; *Hunter v. Potts* (1791), 4 T. R. 182.

(c) *In re Oriental Steam Co., Ex parte Scinde Ry. Co.* (1874), 9 Ch. 557.

(d) *Minna Craig Steamship Co. v. Chartered Bank of India*, [1897] 1 Q. B. 55.

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only by action. The law of some particular *forum* may and does allow the defendant to make a different use of his claim, by striking a balance between it and the claim of the plaintiff; but that appears to be a privilege conferred by the *lex fori*, and in no sense part of the contract. The express contract between the parties may, of course, provide that the claim of the plaintiff, when it arises, should be set against a specified demand of the defendant; but in such a case the defendant's plea is not really one of set-off, but of an express term of the original contract. The point was raised, though not directly decided, in *Macfarlane v. Norris* (1862), 2 B. & S. 783, where Cockburn, C.J., intimated that he was inclined to take the view indicated above, and this *dictum* has been since followed (*e*). The more recent American authorities are to the same effect (*f*). In *Allen v. Kemble* (1848), 6 Moo. P. C. 314 (*g*), which has been cited on the other side in support of the proposition that the right of set-off is really part of the original obligation, there was no conflict between the *lex fori* and the *lex loci contractus* at all; and the only question was whether the contract of the drawer of a bill of exchange was governed by the law of the place where the bill was drawn, or where it was payable.

It is plain, however, that the *lex fori* can never confer a right of action which had no existence by the law which was properly competent to create the obligation. Thus it has been already said that a tort, to be actionable, must be actionable by the law of the place where it was committed, as well as by the law of the tribunal (*supra*, p. 518). Consequently, the better opinion would seem to be that an act which is a criminal offence, but not a personal tort, by the *lex loci*, cannot be the ground of an action here, though by the *lex fori* it might be both. It is true that Wightman, J., in *Scott v. Seymour* (1862), 1 H. & C. 219, intimated an opinion that if a trespass was not lawful or justifiable by the law of the country where it was committed, the mere fact that no personal right to recover damages for it was given by that law would not deprive the person aggrieved of the right of action given to him by English law, at any rate when both the parties were British subjects. This *dictum*, however, was not assented to by the other members of the Court; and the fallacy involved in

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not created
by *lex fori*.

(*e*) *Meyer v. Dresser* (1864), 16 C. B. (N.S.) 646, in which case Willes, J., said at p. 665: "The set-off being admitted to be a matter of procedure, we cannot introduce a case of set-off from the Prussian law simply because the contract sued on is a Prussian 'contract.'"

(*f*) See Story, Conflict of Laws, § 575, and American cases there cited (7th ed.).

(*g*) A case involving *compensatio* under Roman-Dutch law in *Demerara*. Cf. *Rouquette v. Overmann* (1875), 10 Q. B. 525, per Cockburn, C.J., explaining *Allen v. Kemble*; and also *Maspons y Hermano v. Mildred* (1882), 9 Q. B. D. 530, C. A.

it has been already pointed out (*supra*, p. 522). In strict accordance with the principle here advocated, it was said in *Melan v. Fitzjames* (1797), 1 B. & P. 138, that no rule of procedure could avail to give a personal right of action against a contractor, where the *lex loci actus* recognised no right to enforce the obligation at all against the person of the party sued; and though this case has been disapproved by later authorities (*h*), the principle that the personal or real nature of the right must be determined once for all by the *lex loci* remains unassailed. The nature and extent of this principle will be better understood when the cases relating to process and execution have been considered.

Process, or the mode of proceedings by which the judgment and decrees of any tribunal are enforced, similarly depends upon the law of that tribunal alone (*i*). There may, however, be sometimes a difficulty in distinguishing the nature of the original liability on which the judgment is founded from the operation upon it of the law of a foreign Court as to execution. A man, for example, who contracts a debt in a country where imprisonment for debt is unknown, may argue with some plausibility that his contract never contemplated the alternative of personal confinement, by the threat of which the law of the country in which he is sued attempts to hold him to his bargain. From such a point of view, it would appear inequitable that he should be compelled to submit to the provisions of any law which he had not contemplated; but there is a fallacy involved in this aspect of the subject altogether. The natural incidents of the contract, foreseen or unforeseen, are properly the subjects of the intention of the parties; and in adjudicating upon them it is of the highest importance to determine what the contracting parties contemplated, or to what law they intended to refer. Breach, however, is not a natural incident of the contract, but its dissolution. An obligation, it is true, remains; but it is an obligation which arises, not out of the intention of the parties, but out of the refusal of one of them to carry that intention into effect (*k*). Consequently, with the incidents of breach, and the remedies applicable to it, the intention of the parties can have nothing to do. The fallacy of supposing that those who contract undertake an alternative liability to discharge their promise or to be compelled to do so by some particular law, within some particular time, or in some particular way, has already been shown in treating of statutes of limitation (*supra*, p. 549). Persons who contract engage simply to perform their promise; and if they fail to carry out their

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(h) *Imlay v. Ellefsen* (1802), 2 East, 453.

(i) *De la Vega v. Vianna* (1830), 1 A. & Ad. 284; *Don v. Lippmann* (1837), 5 Cl. & F. 1.

(k) *Don v. Lippmann* (1837), 5 Cl. & F. 1, 14.

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undertaking, they must submit to the control of any law within the reach of which they happen to be when a remedy is sought. To break a contract is, in truth, an offence; or, if not a public offence, is at any rate a personal wrong. There is no greater reason why a man who fails to fulfil a promise should be heard to object to any law which properly asserts jurisdiction over him, than why a man who injures another by defamation or actual assault should do the same.

The sole question, therefore, which must in such cases be decided, is whether the contractor assumed, by his agreement, a personal liability or not. If he intended to bind his person for the fulfilment of his promise—and all personal undertakings must necessarily be taken, in the absence of anything to the contrary, to have that effect—then every tribunal under whose jurisdiction he may come will enforce that personal liability in its own way. If, on the contrary, his person, according to his intention and the competent *lex contractus*, was never bound at all, then no foreign law can impose a personal liability for the breach or non-fulfilment of what was never a personal undertaking (l). Thus in *Melan v. Fitzjames* the defendant was held to bail in England on an instrument entered into in France, by which his property only, and not his person, was according to the law of France made liable, and the Court of Common Pleas ordered the bail-bond to be delivered up and cancelled on the defendant entering a common appearance. “The defendant is held to bail,” said Eyre, C.J., “on a contract made in France, the nature of which we must learn, not from the face of the instrument, but from evidence. If it appears that this contract creates no personal obligation, and that it could not be sued as such by the laws of France, there seems to be fair ground on which the Court may interpose to prevent a proceeding so oppressive as a personal arrest in a foreign country, at the commencement of a suit, in a case which, as far as we can judge at present, authorises no proceeding against the person in the country in which the transaction passed. If there could be none in France, in my opinion there can be none here. I cannot conceive that what is no personal obligation in the country in which it arises can ever be raised into a personal obligation by the laws of another. If it be a personal obligation there, it must be enforced here in the mode pointed out by the law of this country; but what the nature of the obligation is must be determined by the law of the country where it was entered into, and then this country will apply its own law to enforce it” (m). It should be

(l) *Melan v. Fitzjames* (1797), 1 B. & P. 138; *Talleyrand v. Boulanger* (1797), 3 Ves. 447; *De la Vega v. Vianna* (1830), 1 B. & Ad. 284.

(m) And see *Talleyrand v. Boulanger* (1797), 3 Ves. 447.

remarked that Heath, J., dissented from the above view, but only on the ground that the contract sued on was in his opinion a personal one, and that the question of arrest was therefore merely one of remedy. On the assumption that the contract was not a personal promise by French law, but a mere hypothecation of property, the decision was no doubt right; but that the view taken by Heath, J., was in reality more consonant to the facts of the case appears from the opinion which Lord Ellenborough intimated in *Imlay v. Ellefsen* (1802), 2 East, 453, and from the later decision in *De la Vega v. Vianna* (1830), 1 B. & Ad. 284, which may be regarded as having settled the law on the subject. In *Don v. Lippmann* (1837), 1 Cl. & F. 1, the general principles applicable to such cases were stated with much clearness by Lord Brougham: "The contract being silent as to the law by which it is to be governed, nothing is more likely than that the *lex loci contractus* should be considered at the time the rule (*sc.* of the remedy), for the parties could not suppose that the contract might afterwards come before the tribunals of a foreign country. But it is otherwise when the remedy actually comes to be enforced. The parties do not necessarily look to the remedy when they make the contract. They bind themselves to do what the law they live under requires; but as they bind themselves generally, it may be taken as if they had contemplated the possibility of enforcing it in another country. . . . Not only the principle of the law, but the known course of the Courts, renders it necessary that the rules of precedent should be adopted, and that the parties should take the law as they find it, when they come to enforce their contract. . . . The distinction which exists as to the principle of applying the remedy, exists with even greater force as to the practice of the Courts when the remedy is to be enforced. No one can say that, because the contract has been made abroad, the form of action known in the foreign court must be pursued in the courts where the contract is to be enforced, or the other preliminary proceedings of those Courts must be adopted, or that the rules of pleading, or the curial practice of the foreign country, must necessarily be followed. . . . No one will contend in terms that foreign rules of evidence should guide us in such cases; and yet it is not easy to avoid that principle in practice if you once admit that, though the remedy is to be enforced in one country, it is to be enforced according to the laws which govern another country."

It may be convenient to state under this head the rules of the English Courts with reference to the service of writs or notices of writs out of the jurisdiction (see also pp. 238, 280, 361, *supra*).

Until the passing of the Common Law Procedure Act, 1852,

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notices out of
the jurisdic-
tion.

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there was no provision for the service of any writ or process outside the jurisdiction, and though the 18th section of that Act remedied the defect, Scotland and Ireland were expressly exempted from its provisions. The original Order (Order XI.) in the Judicature Rules, framed on the passing of the Judicature Act, 1875, removed this distinction; but it will be seen, on reference to this Order in its present revised form, that in favour of persons "domiciled or ordinarily resident in" Scotland or Ireland the older practice is preserved. It must be remembered that service out of the jurisdiction is an interference with the ordinary course of the law, and, apart from statute, no Court has power to allow it (n).

Order XI. r. 1, in its existing form, provides as follows :

"Order XI. r. 1. Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a judge (o) whenever—

"(a) The whole subject-matter of the action is land situate within the jurisdiction (with or without rents or profits) (p); or the perpetuation of testimony relating to the title to land within the jurisdiction (q); or

"(b) Any act, deed, will, contract, obligation, or liability, affecting land or hereditaments situate within the jurisdiction, is sought to be construed, rectified, set aside, or enforced in the action; or

"(c) Any relief is sought against any person (r) domiciled (s) or ordinarily resident (t) within the jurisdiction (u); or

"(d) The action is for the administration of the personal estate of any deceased person who, at the time of his

(n) *Re Busfield* (1886), 32 Ch. D. 123; *Re Maughan*, 22 W. R. 748.

(o) With regard to equitable jurisdiction *in personam*, exercisable by the English Courts, in respect of foreign immovables, against persons locally within their jurisdiction, cf. *Jenney v. Mackintosh* (1886), 33 Ch. D. 595; *Bawtree v. Great North-Western Central Ry. Co.* (1898), 14 T. L. R. 448, C. A.; *Duder v. Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132.

(p) This refers to actions for the recovery of land, see p. 239, *supra*, and to others of a like character, *Agnew v. Usher* (1884), 14 Q. B. 1, affirmed C. A., p. 79.

(q) R. S. C. May 1912, which thus makes obsolete *Slingsby v. Slingsby*, [1912] 2 Ch. 21, C. A.

(r) Person includes corporation (see R. S. C. Ord. LXXI, r. 1). Cf. *Harvey v. Dougherty* (1887), 56 L. T. 322.

(s) As to the meaning of "domiciled," see *supra*.

(t) As to the meaning of "ordinarily resident," see the cases (already cited, *supra*): *Re Williams* (1872), 8 Ch. App. 690; *Re Bowie, ex parte Breull* (1880), 16 Ch. D. 484, C. A.; *New Chile Gold Mining Co. v. Blanco* (1888), 4 T. L. R. 346; *Ghikis v. Musurus* (1909), 25 T. L. R. 225; *Allison v. Independent Press Cable Association of Australasia, Ltd.* (1911), 28 T. L. R. 128, C. A.; *Actiesselskabet Dampskib "Hercules" v. Grand Trunk Pacific Ry. Co.*, [1912] 1 K. B. 222, C. A.; *Casdagli v. Casdagli*, [1919] A. C. 145; *Lord Advocate v. Jaffrey*, [1921] A. C. 146; *Waddington v. Waddington*, 36 T. L. R. 359; *Bell v. Bell*, [1922] 2 I. R. 152; and for "residence in England" see Annual Practice, O. IX, r. 8, at p. 64. See also p. 367, *supra*.

(u) *Slingsby v. Slingsby*, [1912] 2 Ch. 21, C. A.

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death, was domiciled within the jurisdiction; or for the execution (as to property situate within the jurisdiction) (x) of the trusts of any written instrument, of which the person to be served is a trustee, which ought to be executed according to the law of England (y); or

“(e) The action is one brought *against a defendant not domiciled or ordinarily resident in Scotland* to enforce, rescind, dissolve, annul or otherwise affect a contract or to recover damages or other relief for or in respect of the breach of a contract—

(i) made within the jurisdiction, or

(ii) made by or through an agent residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction, or

(iii) by its terms or by implication to be governed by English law,

or is one brought against a defendant not domiciled or ordinarily resident in Scotland or Ireland, in respect of a breach committed within the jurisdiction of a contract wherever made, even though such breach was preceded or accompanied by a breach out of the jurisdiction which rendered impossible the performance of the part of the contract which ought to have been performed within the jurisdiction (z).

“(ee) The action is founded on a tort committed within the jurisdiction (a).

“(f) Any injunction is sought as to anything to be done within the jurisdiction or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof (b); or

(x) The property subject to the trusts, or some portion of it, must be situate within the jurisdiction: *Winter v. Winter*, [1894] 1 Ch. 421. See p. 280, *seq.*, *supra*.

(y) Cf. *Re Eager, Eager v. Johnstone* (1883), 22 Ch. D. 86, C. A.; *Field v. Bennett* (1886), 56 L. J. Q. B. 89, 91; *Wood v. Middleton*, [1897] 1 Ch. 151; *Re Orr-Ewing, Orr-Ewing v. Orr-Ewing* (1882), 22 Ch. D. 456, C. A.

(z) It is not necessary that there should be an express stipulation in the contract providing for its performance within the jurisdiction, *Duval & Co. Ltd. v. Gans*, [1904] 2 K. B. 685, C. A.; *Crozier, Stephens & Co. v. Auerbach*, [1908] 2 K. B. 161, C. A.; but an implied provision is sufficient, *Hoerter v. Hanover Works* (1893), 10 T. L. R. 22, 103, C. A. If there is *prima facie* evidence of a breach within the jurisdiction and the breach is disputed on the other side, leave is given to serve out of the jurisdiction, unless the *prima facie* case fails, *Badische Anilin und Soda Fabrik v. Chemische Fabrik Vormal's Sandoz* (1903), 88 L. T. 490, C. A., affirmed, (1904) 90 L. T. 733, H. L. See p. 361, *supra*. Cf. *Lenders v. Anderson* (1883), 12 Q. B. D. 50; *Channel Coal-ing Co. v. Ross*, [1907] 1 K. B. 145.

(a) See p. 517, *seq.*, *supra*.

(b) If in the opinion of the Court there is no reasonable probability that the plaintiff will obtain an injunction, leave to serve out of the jurisdiction is

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“(g) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction” (c).

This sub-section applies not only to British subjects but also to aliens resident out of the jurisdiction, see *Firth v. De la Rivas*, (1893), 69 L. T. 666.

Service out of the jurisdiction must be effected in the same manner as service within the jurisdiction, viz. either personally or by substituted service, and at the place authorised by the order giving leave, see *Bonnell v. Preston* (1908), 24 T. L. R. 756.

“(h) The action is by a mortgagee or mortgagor in relation to a mortgage of personal property situate within the jurisdiction and seeks relief of the nature or kind following, i.e., sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgagee; but does not seek (unless and except so far as permissible under sub-head (e) of this Rule) any personal judgment or order for payment of any moneys due under the mortgage.

“In this sub-head the expression ‘personal property situate within the jurisdiction’ means personal property which on the death of an owner thereof intestate, would form subject-matter for the grant of letters of administration to his estate out of the Principal Probate Registry; the expression ‘mortgage’ means a mortgage charge or lien of any description; the expression ‘mortgagee’ means a party for the time being entitled to or interested in a mortgage; and the expression ‘mortgagor’ means a party for the time being entitled to or interested in property subject to a mortgage.”

In accordance with the terms of the rule, it has been held that Order XI. r. 1, applies equally to the service of a writ of summons and, except in certain cases to the service of notice of a writ of summons, the service required in each case being the same (d).

By r. 6, when the defendant is neither a British subject nor in British dominions, notice of the writ, and not the writ itself, is to be served on him.

By r. 7, “Where leave is given under rules 1 and 6 of Order XI. to serve notice of a writ of summons out of the juris-

refused, *Watson & Sons v. Daily Record (Glasgow), Ltd.*, [1907] 1 K. B. 853, C. A.; *Marshall v. Marshall* (1888), 38 Ch. D. 330; cf. *Alexander v. Valentine* (1908), 25 T. L. R. 29, C. A.

(c) See pp. 366, 517, *supra*.

(d) *Scott v. Royal Wax Candle Co.* (1876), 1 Q. B. D. 404; *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord*, [1898] 1 Ch. 190; *Dobson v. Festi & Co.*, [1891] 2 Q. B. 92, C. A. See also Order XI. r. 7.

diction, such notice shall, subject to r. 8 of this Order, be served in the manner in which writs of summons are served."

By r. 8, "Where leave is given to serve notice of a writ of summons in any foreign country to which this rule may by order of the Lord Chancellor from time to time be applied, the following procedure shall be adopted :—

"(1) The notice to be served shall be sealed with the seal of the Supreme Court for use out of the jurisdiction, and shall be transmitted to His Majesty's Principal Secretary of State for Foreign Affairs by the President of the Division, together with a copy thereof translated into the language of the country in which service is to be effected, and with a request for the further transmission of the same to the Government of the country in which leave to serve notice of the writ has been given (e).

"(2) The party bespeaking a copy notice of writ for service under this rule shall at the time of bespeaking the same, file a *præcipe* in Form numbered II. in the Schedule (f).

"(3) An official certificate or declaration upon oath, or otherwise, transmitted through the diplomatic channel by the Government or Court of a foreign country to which this rule applies to the English Court shall, provided that it certifies or declares the notice of the writ to have been personally served or to have been duly served upon the defendant in accordance with the law of such foreign country, or words to that effect, be deemed to be sufficient proof of such service and shall be filed of record as, and be equivalent to, an affidavit of service within the requirements of these rules in that behalf.

"(4) Where an official certificate or declaration, transmitted to the English Court in manner provided in the last preceding section of this rule, certifies or declares that efforts to serve a notice of writ have been without effect, the Court or a judge may, upon the *ex parte* application of the plaintiff, order that the plaintiff be at liberty to bespeak a request for substituted service of such notice (g).

"(5) A request for substituted service of a notice of writ under this rule may be bespoken by the plaintiff at the department where writs of summons are issued, upon filing a *præcipe* in Form numbered II. in the schedule to these rules, and the notice of writ and copy of the same and the order shall be sealed and transmitted to the Foreign Office in manner aforesaid together with a request in Form numbered III. in the schedule to these rules, which may be cited as Form No. 10 (c), App. A., Part 1, with such variations as circumstances may require."

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(e) For Form of Request see App. A., Part 1, Form No. 10A, p. 1508.

(f) See *ibid.*, Form No. 10B. (g) See Form No. 20A, App. K., Part 1, p. 1657.

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This rule applies only to service on persons who are not British subjects, since British subjects must be served with the writ itself. The rule was applied by order of the Lord Chancellor to Germany in 1904; to Russia, 1906; to France, Belgium and Spain, 1910; to Portugal and Japan, 1912; to Greece, 1917; re-applied to Germany, 1921; to Switzerland, 1922. The application of the rule to France and Belgium was suspended pending the Conventions of 1922 and 1924.

By r. 8A, "Service out of the jurisdiction may be allowed by the Court or a judge of the following processes or of notice thereof, that is to say:—

"(a) Originating summonses under Order LIV.A or Order LV., rr. 3 or 4 in any case where if proceedings were commenced by writ of summons they would be within r. 1 of this Order.

"(b) Any originating summons, petition, notice of motion, or other originating proceedings (1) in relation to any infant or lunatic or person of unsound mind, or (2) under any statute under which proceedings can be commenced otherwise than by writ of summons, or (3) under any rule of Court or practice whereunder proceedings can be commenced otherwise than by writ of summons.

"(c) Without prejudice to the generality of the last foregoing sub-head any summons, order or notice in any interpleader proceedings or for the appointment of an arbitrator or umpire, or to remit, set aside or enforce an award in an arbitration held or to be held within the jurisdiction.

"(d) Any summons, order, or notice in any proceedings duly instituted, whether by writ of summons or other such originating process as aforesaid. Rules 2, 4, 5, 6, 7 and 8 of this Order shall apply *mutatis mutandis* to such service. Nothing herein contained shall in any way prejudice or affect any practice or power of the Court under which lands, funds, choses in action, rights or property within the jurisdiction are sought to be dealt with or affected, the Court may without affecting to exercise jurisdiction over any person out of the jurisdiction cause such person to be informed of the nature or existence of the proceedings with a view to such person having an opportunity of claiming, opposing or otherwise intervening."

This rule is substituted for the former rule of 1909, before which the power could be exercised only in the case of a writ or notice in lieu of a writ. Now power is given for leave to serve the documents specified in the rule outside the jurisdiction. *In re Aktiebolaget Robertsfors and La Société Anonyme des Papeteries de l'Aa*, [1910] 2 K. B. 727, was decided under the rule of 1909, and it was held that leave could be granted only

where the state of circumstances which would justify the Court in granting leave for service of a writ under r. 1 could be shown. The effect of this decision is expressly preserved as to documents specified under (a), but would appear not to apply to (b), (c) and (d).

And where a writ itself is served upon a foreigner not in British dominions (in violation of the rule), the service is a nullity, and not a mere irregularity, so that all subsequent proceedings will be set aside (*h*). In such a case, it appears from the authorities just cited, that the defendant himself may come to the English Court and apply by summons to set the proceedings aside, though it might imperil his position if he first appeared to the writ. It is the logical complement of r. 6 that either a British subject in foreign dominions or a foreigner in British dominions may be served with a writ itself (*i*).

By r. 183 of the Bankruptcy Rules, 1918, where a debtor is not in England service abroad may be ordered of the receiving order, order of adjudication, order to attend his public examination or any adjournment thereof, or of any other order made against him or summons issued for his attendance as may be thought fit.

Service of foreign legal process is governed by r. 9 : "Where in any civil or commercial matter pending before a Court or tribunal of a foreign country a letter of request from such Court or tribunal for service on any person in England of any process or citation in such matter is transmitted to the Supreme Court by His Majesty's Secretary of State for Foreign Affairs, with an intimation that it is desirable that effect should be given to the same, the following procedure shall be adopted : (1) The letter of request for service shall be accompanied by a translation thereof in the English language and by two copies of the process or citation to be served and two copies thereof in the English language. (2) Service of the process or citation shall be effected by the process-server whom the Lord Chancellor may appoint from time to time for the purpose, or his authorised agent. (3) Such service shall be effected by delivering to and leaving with the person to be served one copy of the process to be served and one copy of the translation thereof, in accordance with the rules and practice of the English Supreme Court regulating service of process. (4) After service has been effected the process-server shall return to the Senior Master of the Supreme Court one

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(*h*) *Hewitson v. Fabre* (1888), 21 Q. B. D. 6; *Boyle v. Sacker* (1888), 39 Ch. D. 249; *Preston v. Lamont* (1876), 1 Ex. D. 361.

(*i*) *Fowler v. Barstow* (1881), 20 Ch. D. 246; *Great Australian Co. v. Martin* (1877), 5 Ch. D. 1; *Padley v. Camphausen* (1878), 10 Ch. D. 550; *Speller v. Bristol Steam Nav. Co.* (1884), 13 Q. B. D. 96; *Bacon v. Turner* (1876), 3 Ch. D. 275.

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copy of the process, together with the evidence of service by affidavit of the person effecting the service verified by notarial certificate and particulars of charges for the cost of effecting such service. (5) The particulars of charges for the cost of effecting service shall be submitted to a Taxing Master of the Supreme Court, who shall certify the correctness of the charges or such other amount as shall be properly payable for the cost of effecting service. A copy of such charges and certificate shall be forwarded to His Majesty's Treasury. (6) The Senior Master shall transmit to His Majesty's Secretary of State for Foreign Affairs the letter of request for service received from the foreign country, together with the evidence of service, with a certificate appended thereto duly sealed with the seal of the Supreme Court for use out of the jurisdiction. Such certificate shall be in the Form in the Schedule to these rules." See Form No. 74A, App. K., R.S.C., Annual Practice, p. 1687.

By r. 10, "Upon the application of the Treasury Solicitor with the consent of His Majesty's Treasury, the Court or a judge may make all such orders for substituted service or otherwise as may be necessary to give effect to these rules."

The procedure to be followed in the service of English documents abroad is laid down in r. 11 : "Where leave is given in a civil or commercial cause or matter to serve any writ or summons, originating summons, notice or other document in France or in any other foreign country with which a Convention in that behalf has been or shall be made, the following procedure shall, subject to any special provisions contained in the Convention be adopted : (1) The party bespeaking such service shall file in the Central Office a request in the Form No. 10BB in Part 1, App. A., which form may be varied as may be necessary to meet the circumstances of the particular case in which it is used. Such request shall state the medium through which it is desired the service shall be effected, *i.e.*, whether (a) directly through the British Consul, or (b) through the foreign judicial authority, and shall be accompanied by the original document and a translation thereof in the language of the country in which service is to be effected certified by or on behalf of the person making the request and a copy of each for every person to be served, and any further copies which the Convention may require, unless the service is required to be made on a British subject directly through the British Consul, in which case the translation and copies thereof need not accompany the request unless the Convention expressly requires that they should do so. (2) The documents to be served shall be sealed with the seal of the Supreme Court for use out of the jurisdiction and shall be forwarded by the Senior Master

of the Supreme Court to the Under-Secretary of State for Foreign Affairs for transmission to the foreign country. (3) An official certificate, transmitted through the diplomatic channel by the foreign judicial authority, or by British consular authority, to the English Court, establishing the fact and the date of the service of the document, shall be deemed to be sufficient proof of such service and shall be filed of record as, and be equivalent to, an affidavit of service within the requirements of these rules in that behalf. (4) In cases where a writ of summons or notice thereof is served pursuant to this rule, and an official certificate of service is produced, no endorsement of service under Order 9, r. 15 shall be required."

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By r. 12, "Rule 11 shall not apply to or render invalid or insufficient any mode of service in any foreign country with which a Convention has been or shall be made which is otherwise valid or sufficient according to English procedure and which is not expressly excluded by the Convention made with such foreign country."

Service of foreign documents in England is governed by r. 13: "Where in any civil or commercial cause or matter pending before a Court or tribunal in France or in any foreign country with which a Convention in that behalf has been or shall be made, a request for service of any document on a person in England is received by the Senior Master of the Supreme Court from the consular or other authority of such country, the following procedure shall, subject to any special provisions contained in the Convention, be adopted: (1) The service shall be effected by the delivery of the original or a copy of the document, as indicated in the request, and the copy of the translation, to the party or person to be served in person by the agent of the official process-server appointed pursuant to Order 11, r. 9 (2). (2) No Court fees shall be charged in respect of the service. The particulars of charges of the agent employed to effect service shall be submitted to a Taxing Master of the Supreme Court, who shall certify the amount properly payable in respect thereof. (3) The Senior Master of the Supreme Court shall transmit to the consular or other authority making the request a certificate establishing the fact and the date of the service in person, or indicating the reasons for which it has not been possible to effect it, and at the same time shall notify to the said consular or other authority the amount of the charges certified under para. (2) hereof."

These three rules came into operation subsequently to the ratification of the French and Belgian Conventions respecting legal proceedings in civil and commercial matters on 2nd July,

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1922, and 29th May, 1924, respectively (*k*). The provisions of these Conventions are almost identical. By Art. 2 of the Anglo-French Convention service may be effected in the manner provided in Arts. 3 and 4 : see App. F. to this chapter.

Contract.—See *supra*, Chap. VIII. “Contracts,” pp. 358—66.

Tort.—See *supra*, Chap. IX., pp. 512—7.

Injunction.—The claim for an injunction must be *bona fide*; and if merely claimed in order to bring the case within Order XI. r. 1, the Court will refuse to grant leave (*l*). It is not necessary that the injunction should be the only relief sought, but it appears necessary that it should be sought against the defendant whom it is desired to serve abroad, unless the case be one falling under sub-section (*g*) (*m*).

Within the Jurisdiction.—The jurisdiction means the jurisdiction of the Court, not of the Crown; and therefore Scotland and Ireland are without the jurisdiction for the purposes of this rule. In *Dunlop Rubber Co., Ltd. v. Dunlop*, [1921] A. C. 367, leave was granted by the House of Lords to the plaintiffs in Ireland to issue a writ against the defendant in England claiming an injunction to restrain the defendant from publishing in Ireland certain pictorial advertisements alleged to constitute a libel on the plaintiffs. For the same reason, although by international law the Crown may assert its jurisdiction up to the three-mile limit from the coast, yet, in the absence of legislation, the jurisdiction of the Court extends to low-water mark only (*n*).

(iv.) EVIDENCE NECESSARY, AND ADMISSIBLE TO SUPPORT
AN ACTION.

Evidence
governed by
lex fori.

This branch of the subject has been already considered when treating of formalities, and it is unnecessary to do more here than recapitulate the conclusions arrived at. The *lex fori* decides all questions relating to the *admissibility* of evidence; but if the evidence, when admitted, goes to show that no obligation was ever validly created by the *lex loci*, and not merely that the obligation, though duly created, could not have been proved in the foreign tribunal, the rules of the *forum* as to procedure will not, of course, be allowed to create an obligation, where none existed before (*o*). Similarly, when the *lex fori* demands a particular

(*k*) Parl. Pap. 1922 [Cmd. 1616 and Cmd. 1661.]

(*l*) *Bernales v. New York Herald*, [1893] 2 Q. B. 97 (*n*).

(*m*) *Lisbon Berlyn Gold Fields v. Heddle* (1885), 52 L. T. 796; *New Chile Co. v. Blanco* (1888), 4 T. L. R. 349.

(*n*) *Reg. v. Keyn* (1877), 2 Ex. D. 63; *Re Smith* (1876), 1 P. D. 300; *Harris v. Owners of Franconia* (1877), 2 C. P. D. 173; *Bree v. Marescaux* (1881), 7 Q. B. D. 434.

(*o*) *Bristow v. Sequeville* (1850), 5 Ex. 275, 279; *Alves v. Hodgson* (1797), 7 T. R. 241; *Clegg v. Levy* (1812), 2 Camp. 166.

kind of evidence to support a particular kind of contract, no obligation arising from such a contract can be recognised, although it may in the first instance have been validly created by the *lex loci actus*, and could be put in suit in a foreign Court. The English Statute of Frauds has accordingly been held to apply to contracts made abroad, and sued upon here (p). On the other hand, a contract which is unenforceable abroad may nevertheless be sued upon in England, if the necessary evidence be produced (q). The necessity of distinguishing between the formalities preliminary to the validity of the contract, and those preliminary to the enforcement of the remedy in the country where it was made, will be seen from the case of *Ex parte Melbourn* (1870), 6 Ch. 64, which has been already cited; and it is plain that it will be necessary to prove the former in every tribunal, while the latter will be dispensed with everywhere but in the Courts of the *locus celebrationis*.

The law on this subject has been briefly expressed by Lord Brougham in *Bain v. Whitehaven and Furness Ry. Co.* (1850), 3 H. L. C. 1. Whether a witness is competent or not; whether a certain matter requires to be proved by writing or not; *whether certain evidence proves a certain fact or not*: that is to be determined by the law of the country where the question arises, where the remedy is sought to be enforced, and where the Court sits to enforce it. It would seem, however, where evidence is taken in one country in aid of a suit or action elsewhere, either on ordinary commission or with the assistance of the local Courts (as in cases under 19 & 20 Vict. c. 113, *infra*), that the prevailing law must be the law of the country where the suit is actually pending for which the evidence is taken, as being the true *forum* (r).

(v.) PROOF OF FACTS PECULIARLY FOREIGN.

The amount of evidence necessary to support a right of action in any particular tribunal, and the admissibility of the evidence offered for that purpose, being thus determined by the *lex fori*, it remains to consider what kind of evidence is required by the Court when investigating certain peculiarly foreign facts. It is unnecessary to say that the ordinary rules of evidence apply indiscriminately to the proof of *res gestæ* and other incidents relevant to the cause of action, wherever they may have taken place; but it is not equally apparent what rules apply to the proof of foreign documents or of foreign law. First, with regard

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(p) *Leroux v. Brown* (1852), 12 C. B. 801; *Acebal v. Levy* (1834), 10 Bing. 376; *Wiedemann v. Walpole*, [1891] 2 Q. B. 534.

(q) Cf. *Hansen v. Dixon* (1906), 96 L. T. 32; 23 T. L. R. 56.

(r) See per Cockburn, C.J., in *Dessilla v. Fels* (1879), 40 L. T. R. 423.

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to foreign documents it is clear that the Court must have the evidence of a translator; a translator being, in the words of Lord Chelmsford, in *Di Sora v. Phillips* (1863), 16 H. L. C. 624, a witness as to the meaning and also the grammatical construction of the words. Next, it must have evidence, adduced by foreign experts if necessary, of the meaning of any words which are of a technical description, or which have a peculiar meaning, different from that which, if literally translated into our language, they would bear. If the instrument is not only written in a foreign language, but to be controlled by a foreign law (s), according to any of the principles already laid down, then if there is any principle of construction applicable to that document by such foreign law, the foreign law on this point must be proved in the manner which will be shown below. "The judge," said Lord Brougham in the *Sussex Peerage Case* (1844), 11 Cl. & F. 115, "has not organs to know and to deal with the text of the foreign law, and therefore requires the assistance of a lawyer who knows how to interpret it." The witnesses having supplied the judge with these facts, they must retire and leave his sufficiently informed mind to his own proper office—that of ascertaining for himself the intention of the parties; or, in other words, of construing the instrument in question (t). So, if there is a foreign custom which affects the construction of a foreign document, witnesses must be heard to explain what the custom is, as evidence is received of customs in respect of trade matters, before the judge can pronounce on the proper effect to be given to it (u). In *Guaranty Trust Co. of New York v. Hannay & Co.*, [1918] 2 K. B. 623 (the facts of which are stated above, p. 470) it was said by Scrutton, L.J., at p. 667, "Foreign law is a question of fact to an English Court; the judgment of a foreign judge is not binding on an English Court, but is the opinion of an expert on the fact, to be treated with respect, but not necessarily conclusive." But in *Dynamit Aktiengesellschaft v. Rio Tinto Co.*, [1918] A. C., at p. 301, Lord Parker pointed out that the onus of proving that the foreign law differs from English law rests upon those who allege a difference. "Until the contrary be proved," said Lord Parker, "the general law of a foreign State is presumed to be the same as the law of this country (x)." But evidence of foreign law is no longer a question for the jury. By s. 15 of the

(s) As to the proper law to govern the construction of foreign contracts, *vide ante*, pp. 415 *seq.*

(t) *Di Sora v. Phillips* (1863), 16 H. L. C. 624, 639.

(u) Per Lord Mansfield in *Mostyn v. Fabrigas* (1774), Cowp. 174.

(x) See Lord Parker's judgment on this point in *The Parchim*, [1918] A. C., at p. 161.

Administration of Justice Act, 1920, 10 & 11 Geo. 5, c. 81, where "it is necessary to ascertain the law of any other country which is applicable to the facts of the case, any question as to the effect of the evidence given with respect to that law shall, instead of being submitted to the jury, be decided by the judge alone." But the foreign document, though construed according to the foreign law to which it is generally subject, and explained by reference to foreign facts, is only admissible in evidence, as has been said, according to the rules of the *lex fori*, and no foreign law will avail to make that primary evidence in a foreign Court which is secondary evidence according to the law of procedure which is there followed (*y*). Where, however, a particular value is given by the foreign law to a foreign document as proof of a fact within the jurisdiction of that law, the same weight will be given to it in any other tribunal, when the foreign law is proved to its satisfaction. Thus, where it was desired to prove a marriage in France which was celebrated before the Revolution, and it was proved by French advocates that registers of marriage were kept at Lille by official authority, and that those registers were authentic documents both before and since the Revolution, properly authenticated copies of these were admitted to prove the marriage (*z*). And in *Abbott v. Abbott and Godoy* (1860), 29 L. J. P. & M. 57, a document was tendered to prove a marriage in Chili, which purported to be an extract from a register of marriages, signed by the curate-rector of the Chilian church where it was solemnised. The signature was duly verified by a public notary, and certified under the hand and seal of the British consul. On proof being adduced that a register was kept by the curate-rector of every church in Chili of the marriages solemnised in it, and that certificates of marriages such as that tendered were received in the Chilian Courts as evidence of the marriage which they purported to certify, the document was received to prove the marriage in question. But a copy of a foreign judgment, certified in a similar manner, will not be entitled to reception here, every tribunal being of course entitled to lay down for itself the manner in which it will take cognisance of the decrees of a foreign Court (*a*). Documentary evidence will not be admissible to prove facts occurring in a foreign country, if such evidence be not admissible by English law, notwithstanding that it is received in that country (*b*). It

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foreign
documents.

(*y*) *Brown v. Thornton* (1837), 6 A. & E. 185 (where a copy of a charter-party made in Batavia was held inadmissible, though in certain circumstances it would have been admissible in the Batavian Courts).

(*z*) *Biddulph v. Lord Camoys* (1846), cited by Keating, J., 29 L. J. P. & M. 58.

(*a*) *Appleton v. Lord Braybrooke* (1817), 6 M. & S. 34; and see 9 Mod. 66.

(*b*) *Finlay v. Finlay and Rudall* (1862), 31 L. J. (P. M. & A.) 149 (a case

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Proof.
—

is now provided by 14 & 15 Vict. c. 99, s. 7, that all judgments, decrees, orders, or other judicial proceedings of any Court of justice in any foreign State or in any British colony, and all other affidavits, pleadings, and other legal documents filed or deposited in any such Court, may be proved in any Court of justice, or before any person having by law or by consent of parties authority to hear, receive and examine evidence, either by examined copies, or by authenticated copies purporting to be sealed with the seal of the Court to which the original belongs, or, in the event of such Court having no seal, to be signed by the judge or one of the judges of the said Court; and that it shall not be necessary to prove the seal or signature with which such authenticated copy purports to be sealed or signed. Similar provisions are contained in the same statute for the proof of proclamations, treaties, and other foreign acts of State.

The common practice of taking evidence abroad by means of a commission clothed with the authority, not of the tribunal or Government in the country where the evidence is taken, but of the tribunal requiring such evidence, is not regarded with uniform approval. In some States municipal laws exist which prohibit the administration of an oath, the taking of evidence, or the exercise of any function which could be called judicial by any persons other than the officers of the local tribunals. This is a matter which, of course, every State has a right to regulate for itself, and does not involve any principle of international law, though such regulations may often interpose practical difficulties in the examination of witnesses abroad (c). By an English statute (19 & 20 Vict. c. 113) (see appendix to this chapter) jurisdiction is given to the English Courts, or to any judge thereof, to order the examination upon oath before a commissioner of any witness within the jurisdiction, upon application for that purpose (by summons at chambers), in aid of any civil or commercial suit in a foreign country, without any writ being issued or other proceedings taken in the English Court. Provision is made for compelling the attendance of witnesses; and false evidence given upon such

in which a certificate of marriage celebrated in a foreign country was held inadmissible here owing to non-compliance with English requirements, in spite of its being received as good evidence by the law of that country). Cf. *Abbott v. Abbott and Godoy*, *supra*.

(c) In 1886 this right was practically asserted in Germany, and proceedings were actually taken there against Mr. A. B. Kempe, an English barrister who had been appointed to take evidence on commission by the English High Court of Justice. As to the persons before whom affidavits for the Probate Division are to be taken abroad, where the local law forbids the administration of an oath by a British consul, see *Re Fawcus* (1884), 9 P. D. 241, and 21 & 22 Vict. c. 95, s. 31. For an analogous instance when an affidavit has been admitted without having been sworn before a consul (under 15 & 16 Vict. c. 86, s. 22), see *Lyle v. Elwood* (1874), 15 Eq. 67.

an examination is made perjury (s. 3). Though it does not appear that much use has been made of this statute, it has been resorted to in the Divorce Court (*d*). It would appear that, in such cases, questions as to the admissibility of evidence would be decided by the law of the country where the suit was pending, which is the real *forum* (*e*).

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Proof of
foreign law.

The proof of foreign law is mainly controlled by the principle that the law of a foreign State is a fact which must be established by properly qualified witnesses (*f*), and of which no tribunal or judge has a right to take judicial notice. No judicial knowledge or discernment is attributed to a judge in such a matter; and if proper proof of a foreign law is not adduced, the Court must proceed according to the law of England (*g*). All that can be required of a tribunal adjudicating on a question of foreign law is to receive and consider all the evidence as to it which is available, and *bona fide* to determine on that, as well as it can, what the foreign law is. If from the imperfect evidence produced before it, or its misapprehension of the effect of that evidence, a mistake is made, it is much to be lamented, but the tribunal is free from blame (*h*). The judge "has not organs to know and to deal with the text of the foreign law, and therefore requires the assistance of a lawyer who knows how to interpret it" (*i*). How far the function of the judge is limited to the reception of this evidence and this assistance is perhaps not wholly free from doubt. It was said by Lord Langdale, that though a knowledge of foreign law is not to be imputed to the judge, there may be imputed to him a knowledge of the general art of reasoning; and that there may therefore be

(*d*) See, e.g. *Simpson v. Hazard* (1887), W. N. 115.

(*e*) *Dessilla v. Fels* (1879), 44 L. T. R. 423. When the judge of a foreign Court, to which a requisition from the Probate and Divorce Court had issued to examine a witness, having the interrogatories and cross-interrogatories before him, examined the witness himself at his discretion without putting the questions *verbatim*, and no further request was made to cross-examine, the deposition so made was received in evidence, though with doubt: *Hitchins v. Hitchins* (1866), 1 P. & D. 153. But the knowledge that the examination will be conducted in this manner may be a reason for refusing to issue a requisition or commission to a foreign Court (*In re Boyse, Crofton v. Crofton* (1882), 20 Ch. D. 760). As to the form of such commission, see *In re Imperial Land Co. of Marseilles* (1870), 37 L. T. R. 588; Seton on Decrees, 7th ed., pp. 103, 107-8; and R. S. C., App. K., pp. 36, 37.

(*f*) *Mostyn v. Fabrigas* (1774), 1 Cowp. 161; *Ganer v. Lanesborough* (1790), 1 Peake, 18; *R. v. Brenan* (1847), 6 L. J. Q. B. 289; *Nelson v. Bridport* (1845), 8 Beav. 527, 536; *Re Turner, Meyding v. Hinchcliff* (1906), W. N. 27; *R. v. Brixton Prison (Governor), ex parte Percival* (1907), 71 J. P. 148, per Lord Alverstone, C.J., at p. 150; *Brailley v. Rhodesia Consolidated, Ltd.*, [1910] 2 Ch. 95, 102. With regard to the law of any part of the King's dominions, the Court may apply the provisions of the British Law Ascertainment Act, 1859; see *infra*.

(*g*) *Lloyd v. Guibert* (1865), 1 Q. B. 115, 129; *Brown v. Gracey* (1821), D. & R. N. P. 41, n.

(*h*) *Castrique v. Imrie* (1870), L. R. 4 H. L. 414, 427.

(*i*) *Sussex Peerage Case* (1844), 11 Cl. & F. 115, per Lord Brougham.

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Proof.

Foreign law
—whether
examinable
by Court.

cases in which the judge may, without impropriety, take upon himself to construe the words of a foreign law, and determine their application to the case before him, especially if there should be a variance or want of clearness in the testimony (*k*). The same view had been apparently adopted by Lord Stowell in earlier cases (*l*), limiting the exercise of this function to the consideration of those authorities which were directly referred to by the witnesses; but, as Lord Langdale remarked in the case cited, a judge endowed as Lord Stowell was might perhaps safely do some things which other judges might find it very hazardous to imitate.

The Court of Appeal, however, has held recently that judges are entitled to look at written laws expressly referred to in the evidence of foreign experts, but only at the sections so referred to (*m*). This rule was laid down after *Nelson v. Bridport* and the *Sussex Peerage Case* had been cited, and may therefore be regarded as conclusively established for the English Courts. The Judicial Committee, indeed, had in *Bremer v. Freeman* (1857), 10 Moo. P. C. 306, assumed an apparently unrestricted right to examine for themselves, not only foreign statutes, but foreign reports and text-writers, but there is no other direct authority for the proposition that a judge may of his own mere motion look even at the written or printed laws of a foreign State. In *Bradlaugh v. De Rin* (1868), 5 C. P. 473, the provisions of the French Code de Commerce were, no doubt, examined critically by the Court, but it is especially remarked in the judgments that the whole Code was, *by agreement of the parties*, considered to be in evidence. The doctrine that it is necessary to prove foreign law as a fact by oral testimony was not therefore impugned, nor is the case even an authority for the admissibility in evidence of the statute law or codes of a foreign country, where the objection is not waived. The objection, though not waived, does not appear to have been taken in *Trimbey v. Vignier* (1834), 1 Bing. N. C. 151, in which the same articles of the Code de Commerce came in question, and were no doubt looked at by the Court. "Upon this point of French law," says Tindal, C.J., "the opinions of the foreign advocates which have been taken by consent since the trial of the cause appear to be contradictory; but as each of them founds his opinion on the Code de Commerce, arts. 137, 138, we feel ourselves at liberty to refer to the text of that Code, in order to form our own judgment on the point." It will be observed that in that case the opinions

(*k*) *Nelson v. Bridport* (1845), 8 Beav. 537.

(*l*) *Lindo v. Belisario* (1795), 1 Hagg. Cons. 216; *Dalrymple v. Dalrymple* (1811), 2 Hagg. Cons. 54.

(*m*) *Concha v. Murrieta* (1889), 40 Ch. D. 543, 549.

of the foreign advocates were taken by consent after the trial, and the disputed articles of the Code were in fact quoted in those opinions; so that both litigants appear to have waived their right to object to anything beyond the testimony of an expert. It is obvious that there is considerable danger in permitting any judge to attempt the construction and application of a foreign code or statute for himself. The opinion of a continental judge, for example, upon the 4th section of the Statute of Frauds, given in ignorance that it had ever been the subject of judicial decision, would certainly be more likely to be wrong than right; and the stricter view would seem to be that a litigant has a right to demand, if he chooses, that the opinion of the witnesses as to the foreign law shall be accepted as conclusive, without any attempt being made by the judge to supplement it by an examination of the foreign law for himself. It is the office of the judge in such a case to decide upon the testimony submitted to him, not upon the comparative validity of the reasons given by the witnesses in support of their opposite opinions (*n*); and the distinction between the task of construing a foreign document or contract after the law affecting it has been proved, and the task of ascertaining that law as a preparatory step towards doing so, will be well seen from the case just cited. The authorities, however, for the proposition that foreign written law may be looked at by the judge, are entitled to considerable respect, and in the *Sussex Peerage Case* (*o*) Lord Campbell gave his opinion in favour of that view in opposition to that taken by Lord Brougham. The Supreme Court of the United States, in a judgment cited at length by Story (*p*), have expressed their opinion that the true rule was, that a foreign written law may be received when it is found in a statute-book, with proof that the book has been officially published by the Government which made the law. It has been said by Blackburn, J., that there is great and obvious danger of error in any attempt to construe the written code of a foreign law, without the aid of foreign lawyers to explain it (*q*), but the rule as laid down for England in *Concha v. Murrieta* (*supra*), admitting for judicial examination only those parts of foreign codes or statutes which have been expressly referred to by expert witnesses, ought to reduce this peril to a minimum. Nevertheless, it does not wholly exclude it.

Whatever may be the rule, however, as to the right of the

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Proof.

Foreign law
—proved by
experts.

(*n*) *Di Sora v. Phillips* (1863), 10 H. L. C. 624, 638.

(*o*) (1844), 11 Cl. & F. 85, 114; see *Baron de Bode's Case* (1851), 8 Q. B. 208; *Millar v. Heinrich*, 4 Camp. 155; *Lacon v. Higgins* (1822), 3 Stark. N. P. C. 178; *Picton's Case* (1806), 30 How. St. Tr. 491; *Middleton v. Janverin* (1802), 2 Hagg. Cons. 437.

(*p*) Story, *Conflict of Laws*, § 641, a, n.

(*q*) Per Blackburn, J., in *Castrique v. Imrie* (1870), 39 L. J. C. P. 350, 355.

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Court to look at the written or printed laws of a foreign country, it is certain that all foreign law may, and all unwritten foreign law must, be proved by parol evidence. The only witness competent to give such evidence is some person who is conversant with the foreign law, either as a legal practitioner in the foreign State, or as holding some other office there the duties of which would entail such knowledge. It does not appear necessary that he should be a legal practitioner or professor, at any rate if the law (*r*) to be proved is a mercantile custom; but it is clearly not sufficient that his knowledge of the law of the foreign State should be derived from his having studied it in another country (*s*). If this were enough, as Alderson, B., observed in *Bristow v. Sequeville*, why should not a Frenchman, who had read books relating to Chinese law, be called to prove what the law of China really is? And in *Cartwright v. Cartwright* (*t*), before Sir James Hannen in the Probate Division of the High Court, in June, 1878, it was held that the Canadian marriage law could not be proved by the testimony of an English barrister, who had enjoyed a large practice in Canadian appeals before the Judicial Committee of the Privy Council; such a practitioner, not being an expert, in the contemplation of law, qualified to give evidence concerning the law of those countries for which the Privy Council is the ultimate court of appeal. Such a witness must be a person *peritus virtute officii*, according to Lord Lyndhurst (*u*), from whose language it appears further that where the witness has no *officium*, he can have no *peritia*; and therefore that a mere resident in a foreign country is not a competent witness to prove its law (*x*). It must be doubted whether the decision of Lord Tenterden, that a French vice-consul in England is *peritus virtute officii*, so as to be a competent witness to prove French law, would be followed at the present day. But a Persian ambassador has been allowed to give evidence of Persian law, on his stating that members of the Persian diplomatic service were expected to be versed in law, but that there were no professional lawyers in Persia (*y*). And in *Re Prince of Oldenburg* (1884), 9 P. D. 234, the law of Russia as to the wills of members of the Russian Imperial family seems

(*r*) *Vanderdonckt v. Thellusson* (1849), 8 C. B. 812. See *R. v. Povey* (1852), 22 L. J. M. C. 19.

(*s*) *Bristow v. Sequeville* (1850), 5 Ex. 275; 19 L. J. Ex. 289; *Re Bonelli* (1875), L. R. 1 P. D. 69.

(*t*) (1878), 26 W. R. 684.

(*u*) *Sussex Peerage Case* (1844), 11 Cl. & F. 85, 134, where *R. v. Dent* (1843), 1 C. & K. 97, is said to be not law; see also, *R. v. Picton* (1806), 80 How. St. Tr. 509; *Ward v. Dey* (1849), 7 N. C. (E. & M.) 96.

(*x*) *Ibid.*

(*y*) *Re Dost Aly Khan* (1880), 6 P. D. 6.

to have been proved by "the certificate of the Russian ambassador" (z).

In addition to this ordinary and common law method of proving foreign law, it was enacted by the Legislature in 1861 (24 & 25 Vict. c. 11) that in any action in one of the English superior Courts, and now therefore in any action in any of the divisions of the High Court of Justice, it shall be competent for the Court to state and remit a special case to a superior Court of any foreign country with which a convention to that effect shall have been made, in order to ascertain the law of that foreign country; and that a certified copy of the opinion of the foreign Court upon the case submitted to it shall be admitted to prove the foreign law. The opinion of the foreign Court, however, is not to be conclusive evidence, as the 2nd section of the same Act authorises the English Court to apply the opinion to the facts, in the same way as if it had been pronounced by itself upon a case reserved or upon a special verdict, "if it shall think fit." The 3rd section of the Act authorises the English Courts to pronounce opinions upon cases similarly remitted to them by foreign States; but it must, of course, be noted that these provisions only apply to those foreign countries or States with the Governments of which a convention has been entered into by the British Government for the purpose of mutually ascertaining British and foreign law in the respective cases. The convention will, of course, determine in each instance to what Court or Courts in the foreign country the application is to be made; but it is not likely that the Act itself will ever be made extensively available (a).

A similar enactment was passed in 1859 for the ascertainment of the law administered in one part of her Majesty's dominions when pleaded in the Courts of another part (b). The two statutes in question are, for the sake of convenience, subjoined in the appendix to this chapter.

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Proof.

Foreign law
—statutory
proof of.

Foreign Law
Ascertain-
ment Act,
1861.

British Law
Ascertain-
ment Act,
1859.

(z) Apparently following *Re Klingemann* (1862), 32 L. J. Prob. 16, and *Re Dormoy* (1832), 3 Hagg. Eccl. 767, where a certificate of the French consul-general was received. This ambassadorial privilege seems peculiar to the Probate Court. In a petition for the dissolution of a marriage celebrated in Hong-Kong, when it was stated that the only legal expert available demanded a prohibitive fee, Gorell Barnes, J., admitted an affidavit of an ex-Governor of the colony, who was not a professional lawyer, but deposed that he was conversant with the law applicable to the case. (*Cooper-King v. Cooper-King* (1900), P. D. 65.) It should be noted, however, that this was an undefended case, and that no authorities appear from the report to have been cited. See *Wilson v. Wilson*, [1903] P. 157; and also *Re Whitelegg*, [1899] P. 267; *R. v. Savage* (1876), 13 Cox C. C. 178; *Re Todd, Shand v. Kidd* (1854), 19 Beav. 582.

(a) Great Britain was not a party to the Hague Convention, 1905, on Civil Procedure. See note to text of statutes as to Order in Council extending these Acts, *mutatis mutandis*, to the Ottoman Empire (Consular Courts).

(b) 22 & 23 Vict. c. 63.

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*Proof.*Proof of
foreign
documents.

The proof in England of foreign or colonial treaties, judgments, records, and other documents, is regulated by the Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 7, which is as follows :

Sect. 7.—“ All proclamations, treaties, and other acts of State of any foreign State or any British Colony ; and all judgments, decrees, orders, and other judicial proceedings of any Court of Justice in any foreign State or in any British Colony ; and all affidavits, pleadings, and other legal documents filed or deposited in any such Court, may be proved in any Court of Justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, *either by examined copies or by copies authenticated as hereinafter mentioned* ; that is to say, if the document sought to be proved be a proclamation, treaty, or other act of State, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign State or British Colony to which the original document belongs ; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial Court, or an affidavit, pleading, or other legal document filed or deposited in any such Court, the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of the foreign or colonial Court to which the original document belongs ; or in the event of such Court having no seal, to be signed by the judge, or if there be more than one judge, by any one of the judges of the said Court ; and such judge shall attach to his signature a statement in writing on the said copy that the Court whereof he is a judge has no seal ; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement.”

Sections 9, 10, and 11 of the same Act establish uniformity in the mode of proof of such documents within England, Wales, Ireland and the Colonies, including all possessions of the British Crown (but not Scotland).

The Courts recently have allowed colonial laws relating to

marriage to be proved by the production of a certified copy of the statutes without requiring the presence of an expert or the filing of an affidavit.

In *Roe v. Roe* (1917), 115 L. T. 792, where the marriage took place in St. Helena, a copy of the entry in the marriage register certified by the registrar and of the ordinances of that island were accepted by Shearman, J., as sufficient evidence of the marriage. In *Gibson v. Gibson* (1921), W. N. 12, when a barrister of New South Wales was called as an expert to prove the application of an Act by the Legislature of New South Wales, Duke, P., in granting a decree nisi, said in future it would be sufficient to produce an affidavit by an expert to prove the passing of a colonial Act in these cases, without calling an expert. Three days later he stated that in view of the Evidence (Colonial Statutes) Act, 1907—to which his attention had not been directed—an affidavit was no longer necessary. For the text of the statute, see Appendix E. Thus *R. v. Brixton Prison (Governor), Ex parte Percival* (1907), 71 J. P. 148, which decided that a colonial statute must be proved by an expert, is now obsolete.

Proof of a marriage in Scotland by a document certified by the registrar to be extracted from the marriage register, coupled with the evidence of the petitioner, was held by Evans, P., to be sufficient.

In 1922 Great Britain entered into a convention with France with the object of facilitating the conduct of legal proceedings arising in civil and commercial matters in their respective territories. The convention provides for service of such documents as are permissible by the law of either party in their respective territories; for rogatory commissions and for the application of the convention to their respective dominions, colonial possessions and protectorates upon simple notification, and to Scotland or Ireland at his Britannic Majesty's pleasure. For the text of the convention see Appendix F.

In *Reece v. Reece*, Times news., 28 Oct., 1924, Duke, P., declared that if the registrar were satisfied that there had been service of the petition in France in accordance with the requirements of the convention such service might be taken to be a sufficient compliance with the Divorce Rules 11 and 14.

A convention (c) with similar provisions between Great Britain and Belgium came into force on May 29, 1924. The text is printed in the Annual Practice, 1925, at p. 2175.

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APPENDIX (A) TO CHAPTER X.

19 & 20 VICT. c. 113.

An Act to provide for taking Evidence in Her Majesty's Dominions in relation to Civil and Commercial Matters pending before Foreign Tribunals.
[29th July, 1856.]

The Foreign
Tribunals
Evidence
Act, 1856.
Order for
examination
of witnesses
in this
country in
relation to
any civil or
commercial
matter
pending
before a
foreign
tribunal.

Whereas it is expedient that facilities be afforded for taking evidence in her Majesty's dominions in relation to civil and commercial matters pending before foreign tribunals: Be it enacted, etc., as follows:

1. Where, upon an application for this purpose, it is made to appear to any Court or judge having authority under this Act that any Court or tribunal of competent jurisdiction in a foreign country, before which any civil or commercial matter is pending, is desirous of obtaining the testimony in relation to such matter of any witness or witnesses within the jurisdiction of such first-mentioned Court, or of the Court to which such judge belongs, or of such judge, it shall be lawful for such Court or judge to order the examination upon oath, upon interrogatories or otherwise, before any person or persons named in such order, of such witness or witnesses accordingly; and it shall be lawful for the said Court or judge, by the same order, or for such Court or judge or any other judge having authority under this Act, by any subsequent order, to command the attendance of any person to be named in such order, for the purpose of being examined, or the production of any writings or other documents to be mentioned in such order, and to give all such directions as to the time, place and manner of such examination, and all other matters connected therewith, as may appear reasonable and just and any such order may be enforced in like manner as an order made by such Court or judge in a cause depending in such Court or before such judge.

Certificate of
ambassador,
etc., suffi-
cient
evidence in
support of
application.

2. A certificate under the hand of the ambassador, Minister, or other diplomatic agent of any foreign Power received by her Majesty, or in case there be no such diplomatic agent, then of the consul-general or consul of any such foreign Power at London, received and admitted as such by her Majesty, that any matter in relation to which an application is made under this Act is a civil or commercial matter pending before a Court or tribunal in the country of which he is the diplomatic agent or consul, having jurisdiction in the matter so pending, and that such Court or tribunal is desirous of obtaining the testimony of the witness or witnesses to whom the application relates, shall be evidence of the matters so certified, but where no such certificate is produced, other evidence to that effect shall be admissible.

Examination
of witnesses
to be upon
oath.

3. It shall be lawful for every person authorised to take the examination of witnesses by any order made in pursuance of this Act, to take all such examinations upon the oath of the witnesses, or affirmation in cases where affirmation is allowed by law instead of oath, to be administered by the person so authorised; [and if, upon such oath or affirmation, any person making the same wilfully and

corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury]. (a).

4. Provided always, that every person whose attendance shall be so required shall be entitled to the like conduct-money and payment for expenses and loss of time as upon attendance at a trial.

5. Provided also, that every person examined under any order made under this Act shall have the like right to refuse to answer questions tending to criminate himself and other questions which a witness in any cause pending in the Court by which, or by a judge whereof, or before the judge [*sic*] by whom the order for examination was made would be entitled to; and that no person shall be compelled to produce, under any such order as aforesaid, any writing or other document that he would not be compellable to produce at a trial of such a cause.

6. Her Majesty's Superior Courts of Common Law (b) at Westminster and in Dublin respectively, the Court of Session in Scotland, and any Supreme Court in any of her Majesty's colonies or possessions abroad, and any judge of any such Court, and every judge in any such colony or possession who by any Order of her Majesty in Council may be appointed for this purpose, shall respectively be Courts and judges having authority under this Act: Provided that the Lord Chancellor, with the assistance of two of the judges of the Common Law at Westminster, shall frame such rules and orders as shall be necessary or proper for giving effect to the provisions of this Act, and regulating the procedure under the same.

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Payment of expenses.
Persons to have right of refusal to answer, etc.

Certain Courts and judges to have authority.

APPENDIX (B).

22 & 23 VICT. c. 63.

An Act to afford Facilities for the more certain Ascertainment of the Law administered in one part of Her Majesty's Dominions when pleaded in the Courts of another part thereof.

[13th August, 1859.]

Whereas great improvement in the administration of the law would ensue if facilities were afforded for more certainly ascertaining the law administered in one part of her Majesty's dominions when pleaded in the Courts of another part thereof: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. If in any action depending in any Court within her Majesty's dominions (c), it shall be the opinion of such Court that it is necessary or expedient for the proper disposal of such action to ascertain the law applicable to the facts of the case as administered in any other part of her Majesty's dominions on any point on which the law of

British Law Ascertainment Act, 1859.

Courts in one part of her Majesty's dominions may remit a case for the opinion in law of a Court in any other part thereof.

(a) The words bracketed have been repealed by the Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), s. 17. Schedule; for the provision substituted therefor, see, *ibid.*, s. 1.

(b) Now the Supreme Court of Judicature (Judicature Act, 1875, *q.v.*).

(c) The Act is extended, *mutatis mutandis*, to the Ottoman dominions, by Order in Council dated May 13, 1882 (*London Gazette*, p. 2209).

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such other part of her Majesty's dominions is different from that in which the Court is situate, it shall be competent to the Court in which such action may depend to direct a case to be prepared setting forth the facts, as these may be ascertained by verdict of a jury or other mode competent, or may be agreed upon by the parties, or as settled by such person or persons as may have been appointed by the Court for that purpose in the event of the parties not agreeing, and upon such case being approved of by such Court or a judge thereof, they shall settle the questions of law arising out of the same on which they desire to have the opinion of another Court, and shall pronounce an order remitting the same, together with the case, to the Court in such other part of her Majesty's dominions, being one of the Superior Courts thereof, whose opinion is desired upon the law administered by them as applicable to the facts set forth in such case, and desiring them to pronounce their opinion on the questions submitted to them in the terms of the Act; and it shall be competent to any of the parties to the action to present a petition to the Court whose opinion is to be obtained, praying such last-mentioned Court to hear parties or their counsel, and to pronounce their opinion thereon in terms of this Act, or to pronounce their opinion without hearing parties or counsel; and the Court to which such petition shall be presented, shall, if they think fit, appoint an early day for hearing parties or their counsel on such case, and shall thereafter pronounce their opinion upon the questions of law as administered by them which are submitted to them by the Court; and in order to their pronouncing such opinion they shall be entitled to take such further procedure thereupon as to them shall seem proper (d).

Opinion to be authenticated and certified copy given.

Opinion to be applied by the Court making the remit.

2. Upon such opinion being pronounced, a copy thereof, certified by an officer of such Court, shall be given to each of the parties to the action by whom the same shall be required, and shall be deemed and held to contain a correct record of such opinion.

3. It shall be competent to any of the parties to the action, after having obtained such certified copy of such opinion, to lodge the same with an officer of the Court in which the action may be depending who may have the official charge thereof, together with a notice of motion setting forth that the party will, on a certain day named in such notice, move the Court to apply the opinion contained in such certified copy thereof to the facts set forth in the case hereinbefore specified, and the Court shall thereupon apply such opinion to such facts in the same manner as if the same had been pronounced by such Court itself upon a case reserved for the opinion of the Court, or upon special verdict of a jury; or the said last-mentioned Court shall, if it think fit, when the said opinion has been obtained before trial, order such opinion to be submitted to the jury with the other facts of the case as evidence, or conclusive evidence as the Court may think fit, of the foreign law therein stated, and the said opinion shall be so submitted to the jury.

Her Majesty in Council or House of Lords on appeal may adopt or reject opinion.

4. In the event of an appeal to her Majesty in Council or to the House of Lords in any such action, it shall be competent to bring under review of her Majesty in Council or of the House of Lords the opinion pronounced as aforesaid by any Court whose judgments are

(d) See as to case sent for opinion of Scotch Court, *Lord v. Colvin* (1859), 1 Dr. & S. 24; and to Supreme Court of Calcutta, *Login v. Coorg* (1862), 30 Beav. 632.

reviewable by her Majesty in Council or by the House of Lords, and her Majesty in Council or that House may respectively adopt or reject such opinion of any Court whose judgments are respectively reviewable by them, as the same shall appear to them to be well founded or not in law.

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5. In the construction of this Act, the word "action" shall include every judicial proceeding instituted in any Court, civil, criminal, or ecclesiastical; and the words "Superior Courts" shall include, in England, the Superior Courts of Law at Westminster, the Lord Chancellor, the Lords Justices, the Master of the Rolls or any Vice-Chancellor, the judge of the Court of Admiralty, the judge ordinary of the Court for Divorce and Matrimonial Causes, and the judge of the Court of Probate; in Scotland, the High Court of Justiciary, and the Court of Session acting by either of its divisions; in Ireland, the Superior Courts of Law at Dublin, the Master of the Rolls, and the judge of the Admiralty Court; and in any other part of her Majesty's dominions, the Superior Courts of Law or Equity therein.

Interpretation of terms.

APPENDIX (C).

24 & 25 VICT. c. 11.

An Act to afford Facilities for the better Ascertainment of the Law of Foreign Countries when pleaded in Courts within Her Majesty's Dominions.
[17th May, 1861.]

Whereas an Act was passed in the twenty-second and twenty-third years of her Majesty's reign, intituled "An Act to afford Facilities for the more certain Ascertainment of the Law administered in one Part of her Majesty's Dominions when pleaded in the Courts of another Part thereof": And whereas it is expedient to afford the like facilities for the better ascertainment, in similar circumstances, of the law of any foreign country or State with the Government of which her Majesty may be pleased to enter into a convention (e) for the purpose of mutually ascertaining the law of such foreign country or State when pleaded in actions depending in any Courts within her Majesty's dominions and the law as administered in any part of her Majesty's dominions when pleaded in actions depending in the Courts of such foreign country or State: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows; viz.

Foreign Law Ascertainment Act, 1861.

1. If, in any action depending in any of the Superior Courts (f) within her Majesty's dominions, it shall be the opinion of such Court that it is necessary or expedient for the disposal of such action, to ascertain the law applicable to the facts of the case as administered in any foreign State or country with the Government of which her Majesty shall have entered into such convention as aforesaid, it shall be competent to the Court in which such action may depend to direct

Superior Courts within her Majesty's dominions may remit a case, with queries, to a Court of any foreign State with which her Majesty may have made a convention for

(e) No convention as contemplated seems in fact to have been entered into.

(f) By Order in Council (*London Gazette*, Nov. 20, 1863, p. 5559) ss. 1 and 2 of this Act are extended to the Mayor's Court, London. And the Act is extended, *mutatis mutandis*, to the Ottoman dominions by Order in Council, May 13, 1882 (*London Gazette*, p. 2209).

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that purpose,
for ascertain-
ment of law
of such
State.

a case to be prepared setting forth the facts as these may be ascertained by verdict of jury or other mode competent, or as may be agreed upon by the parties, or settled by such person or persons as may have been appointed by the Court for that purpose in the event of the parties not agreeing; and upon such case being approved of by such Court or a judge thereof, such Court or judge shall settle the questions of law arising out of the same on which they desire to have the opinion of another Court, and shall pronounce an order remitting the same, together with the case, to such Superior Court in such foreign State or country as shall be agreed upon in said convention, whose opinion is desired upon the law administered by such foreign Court as applicable to the facts set forth in such case, and requesting them to pronounce their opinion on the questions submitted to them; and upon such opinion being pronounced, a copy thereof, certified by an officer of such Court, shall be deemed and held to contain a correct record of such opinion.

Court in
which action
depends to
apply such
opinion to
the facts set
forth in
cases, etc.

2. It shall be competent to any of the parties to the action, after having obtained such certified copy of such opinion, to lodge the same with the officer of the Court within her Majesty's dominions in which the action may be depending who may have the official charge thereof, together with a notice of motion setting forth that the party will, on a certain day named in such notice, move the Court to apply the opinion contained in such certified copy thereof to the facts set forth in the case hereinbefore specified, and the said Court shall thereupon, if it shall see fit, apply such opinion to such facts, in the same manner as if the same had been pronounced by such Court itself upon a case reserved for the opinion of the Court, or upon a special verdict of a jury; or the said last-mentioned Court shall, if it think fit, when the said opinion has been obtained before trial, order such opinion to be submitted to the jury with the other facts of the case as conclusive evidence of the foreign law therein stated, and the said opinion shall be so submitted to the jury: Provided always, that if after having obtained such certified copy the Court shall not be satisfied that the facts had been properly understood by the foreign Court to which the case was remitted, or shall on any ground whatsoever be doubtful whether the opinion so certified does correctly represent the foreign law as regards the facts to which it is to be applied, it shall be lawful for such Court to remit the said case, either with or without alterations or amendments, to the same or to any other such Superior Court in such foreign State as aforesaid, and so from time to time as may be necessary or expedient.

Courts in her
Majesty's
dominions
may pro-
nounce
opinion on
case remitted
by a foreign
Court.

3. If in any action depending in any Court of a foreign country or State with whose Government her Majesty shall have entered into a convention as above set forth such Court shall deem it expedient to ascertain the law applicable to the facts of the case as administered in any part of her Majesty's dominions, and if the foreign Court in which such action may depend shall remit to the Court in her Majesty's dominions whose opinion is desired a case setting forth the facts and the questions of law arising out of the same on which they desire to have the opinion of a Court within her Majesty's dominions, it shall be competent to any of the parties to the action to present a petition to such last-mentioned Court whose opinion is to be obtained, praying such Court to hear parties or their counsel, and to pronounce their opinion thereon in terms of this Act, or to pronounce their opinion

without hearing parties or counsel; and the Court to which such petition shall be presented shall consider the same, and if they think fit, shall appoint an early day for hearing parties or their counsel on such case, and shall pronounce their opinion upon the questions of law as administered by them which are submitted to them by the foreign Court; and in order to their pronouncing such opinion they shall be entitled to take such further procedure thereupon as to them shall seem proper, and, upon such opinion being pronounced, a copy thereof, certified by an officer of such Court, shall be given to each of the parties to the action by whom the same shall be required.

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4. In the construction of this Act, the word "action" shall include every judicial proceeding instituted in any Court, civil, criminal, or ecclesiastical; and the words "Superior Courts" shall include, in England, the Superior Courts of Law at Westminster, the Lord Chancellor, the Lords Justices, the Master of the Rolls or any Vice-Chancellor, the judge of the Court of Admiralty, the judge ordinary of the Court of Divorce and Matrimonial Causes, and the judge of the Court of Probate; in Scotland, the High Court of Justiciary, and the Court of Session acting by either of its divisions; in Ireland, the Superior Courts of Law at Dublin, the Master of the Rolls, and the judge of the Admiralty Court; and in any other part of her Majesty's dominions, the Superior Courts of Law or Equity therein; and in a foreign country or State, any Superior Court or Courts which shall be set forth in any such convention between her Majesty and the Government of such foreign country or State.

Interpreta-
tion of
terms.

APPENDIX (D).

Colonial Laws Validity Act, 1865.

28 & 29 VICT. c 63.

6. The certificate of the clerk or other proper officer of a legislative body in any Colony to the effect that the document to which it is attached is a true copy of any Colonial Law assented to by the Governor of such Colony or of any Bill reserved for the signification of her Majesty's pleasure by the said Governor shall be prima facie evidence that the document so certified is a true copy of such Law or Bill and, as the case may be, that such Law has been duly and properly passed and assented to or that such Bill has been duly and properly passed and presented to the Governor; and any Proclamation purporting to be published by authority of the Governor in any newspaper in the Colony to which such Law or Bill shall relate and signifying her Majesty's disallowance of any such Colonial Law or her Majesty's assent to any such reserved Bill as aforesaid shall be prima facie evidence of such disallowance or assent.

APPENDIX (E).

Evidence (Colonial Statutes) Act, 1907.

7 EDW. 7, c. 16.

An Act to facilitate the admission in evidence of statutes passed by the Legislatures of British possessions and protectorates, including Cyprus.

Proof of
statutes of
British
possessions.

1.—(1) Copies of Acts, ordinances, and statutes passed (whether before or after the passing of this Act) by the Legislature of any British possession, and of orders, regulations, and other instruments issued or made, whether before or after the passing of this Act, under the authority of any such Act, ordinance, or statute, if purporting to be printed by the Government printer, shall be received in evidence by all courts of justice in the United Kingdom without any proof being given that the copies were so printed.

(2) If any person prints any copy or pretended copy of any such Act, ordinance, statute, order, regulation, or instrument which falsely purports to have been printed by the Government printer, or tenders in evidence any such copy or pretended copy which falsely purports to have been so printed, knowing that it was not so printed, he shall, on conviction be liable to be sentenced to imprisonment with or without hard labour for a period not exceeding twelve months.

(3) In this Act—

The expression “Government printer” means, as respects any British possession, the printer purporting to be the printer authorised to print the Acts, ordinances, or statutes of the Legislature of that possession, or otherwise to be the Government printer of that possession :

The expression “British possession” means any part of His Majesty’s dominions exclusive of the United Kingdom, and, where parts of those dominions are under both a central and a local Legislature, shall include both all parts under the central Legislature and each part under a local Legislature.

28 & 29 Vict.
c. 63.

(4) Nothing in this Act shall affect the Colonial Laws Validity Act, 1865.

(5) His Majesty may by Order in Council extend this Act to Cyprus and any British protectorate, and where so extended this Act shall apply as if Cyprus or the protectorate were a British possession, and with such other necessary adaptations as may be made by the Order.

Short title.

2. This Act may be cited as the Evidence (Colonial Statutes) Act, 1907.

APPENDIX (F.)

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*Convention between the United Kingdom and France respecting Legal Proceedings in Civil and Commercial Matters (a).**Signed at London, February 2, 1922.**[Ratifications exchanged at London, May 2, 1922.]*

His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, and the President of the French Republic, being desirous to facilitate the conduct of legal proceedings between persons resident in their respective territories, have decided to conclude a Convention for this purpose and have accordingly nominated as their Plenipotentiaries:

His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India: the Most Honourable the Marquess Curzon of Kedleston, K.G., His Majesty's Principal Secretary of State for Foreign Affairs;

The President of the French Republic: His Excellency Count de Saint-Aulaire, Ambassador Extraordinary and Plenipotentiary of the French Republic in London;

Who, having communicated their full powers, found in good and due form, have agreed as follows:—

ARTICLE 1.

This Convention applies only to civil and commercial matters.

Transmission of Judicial and Extra-judicial Documents.

ARTICLE 2.

In cases where the law of one of the High Contracting Parties permits documents to be served in the territory of the other, such service may be effected in either of the following ways indicated in Articles 3 and 4.

ARTICLE 3.

(a.) The request for service is addressed:

In France, by the British Consul to the "Procureur de la République" within whose jurisdiction the recipient of the document is;

In England, by the Consul-General of France in London to the Senior Master of the Supreme Court of Judicature in England.

(b.) The request is drawn up in the language of the authority applied to. It contains the name of the authority from whom the document enclosed emanates, the names and descriptions of the parties, and the address of the recipient. It is accompanied by the original and two copies of the document in question in the language of the State making the request, and by a translation certified by the consular authority of that State, and a copy of such translation.

(c.) The service is effected by the delivery of the original or a copy of the document as indicated in the request, and the copy of the

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translation, to the recipient in person, in England, by a process server; in France, by a "huissier" appointed by the "Procureur de la République."

(d.) The judicial authority applied to transmits to the consular authority making the request a certificate establishing the fact and the date of the service in person, or indicating the reasons for which it has not been possible to effect it.

(e.) When the document transmitted to the "Procureur de la République" is intended for a person resident in another jurisdiction, this magistrate will immediately notify the consular authority making the request, and will, of his own motion, transmit the document to the "Procureur de la République" who is competent.

(f.) No State fees of any nature whatever shall be charged in respect of the service. Nevertheless, the State making the request must repay to the State applied to any charges which are payable under the local law to the persons employed to effect service. These charges are calculated in accordance with the tariff in force in the State applied to. Repayment of these charges is claimed by the judicial authority applied to from the consular authority making the request when transmitting the certificate provided for in paragraph (d.).

(g.) The execution of a request for service can only be refused if the State in whose territory it is to be effected considers it such as to compromise its sovereignty or safety.

(h.) Any difficulties which may arise in respect of the request shall be settled through the diplomatic channel.

ARTICLE 4.

The service of judicial or extra-judicial documents may also be made directly and without the application of any compulsion through the medium and under the responsibility of the consular authority of each of the High Contracting Powers in the territory of the other.

"Commissions rogatoires."

ARTICLE 5.

Evidence which is required for use in one of the contracting countries is taken in the territory of the other, at the request of the party interested, in one of the ways indicated in Articles 6, 7 and (where applicable) 8.

ARTICLE 6.

(a.) The competent judicial authority of one of the parties addresses itself by means of a "commission rogatoire" to the competent judicial authority of the other State, requesting it to take the evidence of witnesses within its jurisdiction in legal form.

(b.) The "commission rogatoire" is transmitted—

In England, by the Consul-General of France in London to the Senior Master of the Supreme Court of Judicature in England;

In France, by the British Consul to the "Procureur de la République" within whose jurisdiction the "commission rogatoire" is to be executed.

(c.) The "commission rogatoire" is drawn up in the language of

the authority making the request and accompanied by a translation in the language of the authority applied to.

(d.) The judicial authority to whom the "commission rogatoire" is addressed executes it by the use of the same compulsory measures as would be applied in the case of a commission emanating from the authorities of the State applied to or of a request to that effect made by an interested party in the territory of that State.

(e.) The authority making the request is, if it so desires, informed of the date and place where the proceedings asked for will take place, in order that the interested party may be able to be present either in person or by his representative.

(f.) The execution of a "commission rogatoire" can only be refused—

1. If the authenticity of the document is not established;
2. If the State within whose territory the execution was to have taken place considers it such as to affect its sovereignty or safety.

(g.) In case the authority applied to is without jurisdiction, the "commission rogatoire" is forwarded without any further request to the competent authority of the same State, in accordance with the rules laid down by the law of the latter.

(h.) In every instance in which the "commission rogatoire" is not executed by the authority applied to, the latter at once informs the authority making the request, stating the grounds on which the execution of the "commission rogatoire" has been refused, and in the event of the authority being without jurisdiction, the authority to whom the commission has been forwarded.

(i.) The judicial authority proceeding to the execution of a "commission rogatoire" applies, so far as the procedure to be followed is concerned, the law of its own country.

Nevertheless, an application by the authority making the request that some special procedure may be followed shall be acceded to, provided such procedure be not contrary to the law of the State applied to.

(j.) No State fees of any nature shall be levied in respect of the execution of the "commission rogatoire."

Nevertheless, the State making the request repays to the State applied to the charges and expenses payable to witnesses or experts, the costs of obtaining the attendance of witnesses who have not appeared voluntarily, and finally, the charges payable to any person whom the competent judicial authority may have deputed to act in cases where the local law permits this to be done.

The repayment of these expenses is claimed by the authority applied to from the authority making the request when transmitting to it the documents establishing the execution of the "commission rogatoire." These charges are calculated in accordance with the tariff in force in the State applied to.

(k.) Any difficulties which may arise in respect of the transmission of the "commission rogatoire" are settled through the diplomatic channel.

ARTICLE 7.

(a.) The evidence may also be taken without the intervention of the local authority by the consular authority of the country before whose courts the evidence is to be used.

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(b.) The consular authority may invite the attendance of witnesses and the production of documents and administer an oath, but without exercising any compulsory powers.

(c.) The consular authority takes the evidence in accordance with the laws of his own country. The parties have the right to be present or to be represented by any person who is competent to act before the tribunals of the consul's State.

ARTICLE 8.

(a.) If the law of the country applied to authorises such procedure, the competent court of the State applied to may be requested to appoint a person to take the evidence. Such person may be a consular authority of the State making the request or any other person proposed by that State.

(b.) In this case the court applied to takes the necessary steps to secure the attendance of witnesses and the production of documents, making use, if necessary, of its compulsory powers.

(c.) The person thus nominated has the same power to administer an oath as a judge, and persons giving false evidence before him are liable in the courts of the State applied to to the penalties provided by the law of that State for perjury.

(d.) The evidence is taken in accordance with the law of the country in which it is to be used, and the parties have the right to be present in person or represented by any persons who are competent to act before the courts of that State.

ARTICLE 9.

The fact that an attempt to take evidence under the procedure laid down in Article 7 has failed owing to a refusal of a witness to appear, give evidence or produce documents does not prevent an application being subsequently made to take the evidence in accordance with Article 8.

Final Provisions.

(a.) The present Convention shall come into force two months after the date on which ratifications are exchanged and shall remain in force for three years after its coming into force. In case neither of the High Contracting Parties shall have given notice to the other six months before the expiration of the said period of its intention to terminate the Convention, it shall remain in force until the expiration of six months from the day on which either of the High Contracting Parties shall have given such notice.

(b.) This Convention shall not apply to any of the Dominions, Colonies, Possessions or Protectorates of the two High Contracting Parties, but either High Contracting Party may at any time extend, by a simple notification, this Convention to any such Dominion, Colony, Possession or Protectorate.

Such notification shall state the date on which the Convention shall come into force, the authorities to whom judicial and extra-judicial acts and "commissions rogatoires" are to be transmitted, and the language in which communications and translations are to be made.

Each of the High Contracting Parties may, at any time after the expiry of three years from the coming into force of the extension of

this Convention to any of its Dominions, Colonies, Possessions or Protectorates, terminate such extension on giving six months' previous notice.

(c.) This Convention shall also not apply to Scotland or Ireland; but His Britannic Majesty shall have the right to extend the Convention to Scotland or Ireland on the conditions set forth in the preceding paragraph in respect of Dominions, Colonies, Possessions or Protectorates.

In witness whereof the Undersigned have signed the present Convention and have affixed thereto their seals.

Done in duplicate at London, the 2nd day of February, 1922.

(L.S.) CURZON OF KEDLESTON.

(L.S.) SAINT-AULAIRE.

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CHAPTER XI.

FOREIGN JUDGMENTS, AND FOREIGN AWARDS.

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CAP. XI.

*Judgments.*Foreign
judgments—
how enforced.(i.) FOREIGN JUDGMENTS GENERALLY, AND MORE PARTICULARLY
FOREIGN JUDGMENTS IN PERSONAM.

THE judgments or decrees of any tribunal have obviously no right to claim recognition beyond the jurisdiction of that tribunal on any principle akin to that which renders them binding within it. They are in fact the judicial orders of the sovereign power in the State, pronounced by the mouth of one of its tribunals, and can only claim to be carried in effect by the executive officers of that State within its limits (*a*). The comity of nations does, however, accord them a certain recognition, and it has been said by a celebrated American judge (*b*) that the Courts of England give as full effect to foreign sentences as is given to them in any part of the civilised world (*c*). Recognition may be accorded in three ways. The foreign judgment may be adopted by the domestic Court as its own, and admitted to execution within its jurisdiction; or it may be received as evidence of the creation of an obligation; or lastly, it may be received as evidence of the original obligation, in a suit brought on the primary cause of action. The first of these methods, according to Westlake (*d*), is that generally followed on the continent of Europe; though several of the Continental nations, including France, enforce the judgments of other countries only where there are reciprocal treaties to that effect; the second is the mode adopted in England and America, and in countries which possess a cognate system of jurisprudence; while in some few States, such as Sweden, Spain, and

(*a*) As to the proof of foreign judgments, see 14 & 15 Vict. c. 99, s. 7, and *supra*, p.

(*b*) Marshall, C.J., in *Rose v. Himely* (1808), 4 Cranch, 270; Story, Conflict of Laws, § 590.

(*c*) Cf. *Pemberton v. Hughes*, [1899] 1 Ch. 781, C. A.; *Jeannot v. Fuerst* (1909), 25 T. L. R. 424. The foreign Court pronouncing the judgment must be a judicial Court, and not a political court or court of honour; cf. *Robinson v. Bland* (1760), 2 Burr. 1077. An award in a foreign arbitration is likewise not considered a judicial sentence, and so cannot be enforced here by action; cf. *Merrifield, Ziegler & Co. v. Liverpool Cotton Association, Ltd., and Hapke & Co.* (1911), 105 L. T. 97. See also *Warren v. Baring Brothers & Co., Ltd.* (1910), 54 Sol. Jo. 720 (where "trustee process" of the State of Massachusetts was not recognised in this country).

(*d*) Westlake, Priv. Int. Law (1922), § 313, p. 380.

Norway, the plaintiff is relegated to his original cause of action. In England, then, a foreign judgment is ordinarily enforced by bringing an action upon it; and it is to be remarked that, though it has been said that this practice does not strictly rest upon "what is loosely called international comity" (e), it does rest strictly upon international comity, properly understood. "Where a Court of competent jurisdiction," said Parke, B., in *Williams v. Jones* (1845), 13 M. & W. 633, "has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial Courts are supported and enforced" (f). This statement of principle was cited and adopted by Blackburn, J., in *Godard v. Gray* (1870), 6 Q. B. 139, and *Schibsby v. Westenholz*, and is in reality only a variation of the general rule that obligations which have once been duly created by a competent and appropriate law will be recognised in all tribunals alike. The phrase "comity of nations" does emphatically mean this, or it means nothing (g). But though the most usual mode of enforcing a foreign judgment in England is by bringing an action upon it, the plaintiff is not obliged to take this course. A foreign judgment involves no merger of the original cause of action; and it is therefore open to the plaintiff to sue upon that if he chooses. "This, being only a foreign judgment," said Bayley, J., in *Hall v. Odber* (1809), 11 East, 124, "did not merge or extinguish the plaintiff's simple contract debt, which can only be done by converting it into a debt of a higher nature; it is only evidence of the debt." "If, then," says Tindal, C.J., in *Smith v. Nicolls* (1889), 5 Bing. N. C. 208, "the judgment has not altered the nature of the rights between the parties, it appears to me that the plaintiff has his option, either to resort to the original ground of action, or to bring an *assumpsit* on the judgment recovered" (h). It was suggested as a moot point before the Judicature Acts in *Doe v. Olivir*, 2 Sm. L. C., [1903] 724, whether, in cases where the plaintiff elected to sue on the original cause of action, it would not be open to the defendant to controvert the ground of action notwithstanding the production of the foreign judgment as evidence; on

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by action.

(e) Per Blackburn, J., in *Schibsby v. Westenholz* (1870), 6 Q. B. 159. For the mode of proof of foreign judgments, see 14 & 15 Vict. c. 99, s. 7, and *supra*, p. 570.

(f) See *Russell v. Smyth* (1842), 9 M. & W. 819.

(g) Story, *Conflict of Law*, §§ 38, 38 a; Westlake (1922), p. 22; Huber, *De Conflictu Legum*, s. 2; Baty, *Polarized Law*, p. 148; *Dalrymple v. Dalrymple* (1811), 2 Hagg. Cons. 59.

(h) *Bank of Australasia v. Nias* (1851), 15 Q. B. 717; *Bank of Australasia v. Harding* (1850), 19 L. J. C. P. 345; 9 C. B. 661; *Castrique v. Behrens* (1861), 30 L. J. Q. B. 163; *Kelsall v. Marshall* (1856), 1 C. B. (N.S.) 241.

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the same principle on which it has been held that where there is an opportunity of placing a domestic judgment on the record, and it is not placed there, it will not be conclusive (*i*). It is hardly probable that the point will arise under the new practice, as it is most unlikely that the statement of claim in such a case would be framed without setting out both the original cause of action and the foreign judgment; but should a foreign judgment be relied upon only as evidence, and not as an original cause of action, it is quite clear that it would at least be evidence, and strong *prima facie* evidence, of the obligation on which it was based. Speaking of the ordinary practice of suing on a judgment, Blackburn, J., says in *Godard v. Gray*: "The mode of pleading shows that the judgment was considered, not as merely *prima facie* evidence of that cause of action for which the judgment was given, but as in itself giving rise, at least *prima facie*, to a legal obligation to obey that judgment and pay the sum adjudged. This may seem a technical mode of dealing with the question, but in truth it goes to the root of the matter. For if the judgment were merely considered as evidence of the original cause of action, it must be open to meet it by any counter evidence negating the existence of that original cause of action" (*k*). On this principle it has been held that the summary procedure in cases of contract given by Order XIV. under the Judicature Acts is applicable to an action on a foreign judgment (*l*). But a foreign judgment which in its own *forum* creates a personal obligation only, will not be enforced in England by proceedings *in rem* (*m*). And of course a foreign judgment which is not a bar to subsequent proceedings between the same parties, even in the country where it was obtained, is not a final judgment which can be sued upon in England (*n*).

Thus, in *Harrop v. Harrop*, [1920] 3 K. B. 386, where there was a power reserved to the Court to vary a maintenance order, the judgment was held not to be conclusive or final. "In order that a foreign judgment may be enforceable in an English Court it must be a final and conclusive judgment of the Court by which it was pronounced, and it is not a final and conclusive judgment of that Court if an order has to be obtained in that Court for its enforcement, or if on application to that Court for an order to

(*i*) *Vooght v. Winch* (1819), 2 B. & Ald. 162; *Doe v. Huddart*, 2 C. M. & R. 316.

(*k*) See also *Phillips v. Hunter* (1795), 2 H. Bl. 410; *Sinclair v. Fraser* (1771), 1 Dougl. 4 a; *Hall v. Odber* (1809), 11 East, 124.

(*l*) *Grant v. Easton* (1883), 13 Q. B. D. 302. Cf. *Hodson v. Baxter* (1858), E. B. & E. 884, under the Common Law Procedure Act, 1852.

(*m*) *The City of Mecca* (1881), 6 P. D. 106.

(*n*) *In re Henderson, Nouvion v. Freeman* (1887), 37 Ch. D. 244; affirmed H. L., 59 L. J. Ch. 337.

enforce it, the original judgment is liable to be abrogated or varied." This headnote was declared by Bankes, L.J., in *Beatty v. Beatty*, [1924] 131 L. T. 226, to be a clear and concise summary of the law on the subject.

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It was held by Astbury, J., in *In re Macartney, Macfarlane v. Macartney*, [1921] 1 Ch. 522, that a valid foreign judgment *in personam* cannot be enforced in England in (*inter alia*) the following circumstances: (a) if it is contrary to public policy, *e.g.*, by recognising the rights of an illegitimate child to perpetual maintenance against the putative father and his estate; (b) if the cause of action is unknown in England, *e.g.*, the right to a posthumous affiliation order; (c) if the judgment is not final and conclusive as to the amount payable, *e.g.*, if the maintenance can be varied or terminated according to the child's circumstances.

In *Beatty v. Beatty*, *supra*, it appeared that by the law of the State of New York a Court which had pronounced a judgment for alimony had no power to interfere with accrued instalments of alimony though it might vary its order with respect to future payments. (See *Sistare v. Sistare*, [1909] 218 U. S. 1.) It is otherwise here. As Grove, J., said in *Bailey v. Bailey* (1884), 13 Q. B. D. 855, "no case has been cited to show that the Divorce Court has not the power to interfere with respect to past payments." And Joyce, J., took the same view in *Robins v. Robins*, [1907] 2 K. B. 13, where, speaking of the order, he said: "It still remains subject to the control of the Divorce Division, which may vary it from time to time, and there is a discretion even as to arrears." The judgment in the present case being by American law final and enforceable by action in another State, it was held by the Court of Appeal that such judgment was a final judgment and that an action for payment of the arrears due under such judgment was maintainable here.

In *M'Donnell v. M'Donnell*, [1921] 2 I. R. 148, it was held by the King's Bench Division (Malony, C.J., and Gordon, J., Pim, J., *dissentiente*), reversing the order of Samuels, J., that the order made by the District Court of the Third Judicial District of the State of Montana, U.S.A., made in an action in which the plaintiff sued her husband for support and maintenance, was not a final and conclusive judgment. This was an action against the executor of the husband. Although the plaintiff had a final judgment for each monthly instalment of maintenance, the Court held that the order of the Court of Montana directing payment into Court, until further order, was not a final judgment that the deceased was indebted to the plaintiff in £480, the total of such instalments. The dissenting judgment of Pim, J., agreeing

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with the judgment of Samuels, J., would, however, appear to be the more reasonable. "If this order," he said, "cannot be treated as a final and conclusive order, because of the possible necessity in the future of varying it, then there never can be a final and conclusive order in a suit for maintenance,—a proposition which seems to me untenable." The direction to pay into Court is mere machinery and does not prevent it from being a final order.

There is one well-recognised exception to the principle that the legal obligation to pay a judgment pronounced by a competent tribunal will be recognised in all other States. No action lies upon a foreign judgment obtained on a foreign penal statute (o). The meaning of "penal" in this connection is best conveyed by citing the words of an American judge, adopted by the Privy Council in the case of *Huntington v. Attrill*, [1893] A. C. 150. "The rule that the Courts of no country execute the law of another applies not only to prosecutions and sentences for crimes and misdemeanours, but to all suits in favour of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties." The rule has its foundation "in the well-recognised principle that crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the State Government or of someone representing the public, are local in this sense, that they are only cognisable and punishable in the country where they were committed" (p). But it was held in *Raulin v. Fischer*, [1911] 2 K. B. 93, that where, for instance, as under French law, in a criminal prosecution, the person injured also claims damages and the offender is convicted and damages are awarded, the judgment in such a case is severable, and that the portion of the judgment awarding damages is not within the rule of international law, which prohibits Courts of justice from executing the penal judgments of a foreign Court, but they may be enforced by action here.

The ordinary mode adopted in England of enforcing a foreign judgment being, then, to bring an action upon it, as creating a substantive legal obligation, it becomes important to consider what objections may be taken to its validity. Anything which negatives the existence of that legal obligation, or excuses the

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(o) *Folliott v. Ogden* (1789), 1 H. Bl. 1, 124; *Ogden v. Folliott* (1790), 3 T. R. 734.

(p) This is also the rule of the Supreme Court of the United States (*Wisconsin v. Pelican Insurance Co.* (1888), 8 Supr. Cont. Rep. 1370). On the question of the locality of crime, see per Lord Halsbury, C., in *Macleod v. A.-G. for New South Wales* (1891), 60 L. J. P. C. 55; and *ante*, p. 538.

defendant from the performance of it, must form a good defence to the action. It must be open, therefore, to the defendant to show that the Court which pronounced the judgment had not jurisdiction to pronounce it, either (1) because they exceeded the jurisdiction given to them by the foreign law, or (2) because he, the defendant, was not subject to that jurisdiction (q). That the foreign Court should have had jurisdiction in the first instance is the essential condition implied by Parke, B., in his enunciation of the principle on which foreign judgments are recognised here, cited above (r), and, indeed, hardly stands in need of authority to confirm it. But it is clearly not sufficient, in order to impeach a foreign judgment, to show that the Court which pronounced it had no jurisdiction by its own rules, if it had jurisdiction according to the principles of international law over the person of the defendant and the subject-matter of the action (s). Thus a plea to an action on a judgment of the French Tribunal of Commerce, that the Court was not a Court of competent jurisdiction in that behalf, *according to the French law*, because the defendant was not a trader, and was not resident in a particular town when the cause of action arose, was held bad. It is obvious that these defences, being admittedly defences by the French law, should have been pleaded in the French Court, and it is well established that defences which might have been raised in the Court where the judgment was obtained, cannot be brought forward afterwards to impeach it (t). And mere irregularity of procedure under the local law in the foreign Court will not be a ground for impeaching a judgment obtained under it, even though the defect be such that the judgment might have been successfully invalidated in such foreign Court. "It sounds paradoxical to say that a decree of a foreign Court should be regarded here as more efficacious or with more respect than it is entitled to in the country in which it was pronounced. But this paradox disappears when the principles on which English Courts act in regarding or disregarding foreign judgments are borne in mind. If a judgment is pronounced by a foreign Court over persons within its jurisdiction, and in a matter with which it is competent to deal, English Courts never investigate the propriety of the proceedings in the foreign Court, unless they offend against English views of sub-

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(q) *Godard v. Gray* (1870), 6 Q. B. 149. Cf. the classification of foreign judgments by Wright, J., in *Turnbull v. T. W. & J. Walker* (1892), 67 L. T. 767.

(r) *Russell v. Smyth* (1842), 9 M. & W. 819; *Williams v. Jones* (1845), 11 M. & W. 633.

(s) *Vanquelin v. Bouard* (1863), 33 L. J. C. P. 78, 84; 15 C. B. (N.S.) 341.

(t) *Henderson v. Henderson* (1843), 6 Q. B. 288; *Bank of Australasia v. Nias* (1851), 16 Q. B. 717; *Ricardo v. Garcias* (1845), 12 Cl. & F. 368; *Vanquelin v. Bouard* (1863), 33 L. J. C. P. 78; 15 C. B. (N.S.) 341.

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stantial justice. . . . The jurisdiction which alone is important in these matters is the competence of the Court in an international sense : *i.e.*, its territorial competence over the subject-matter and over the defendant. Its competence or jurisdiction in any other sense is not regarded as material by the Courts of this country ” (*u*). There may, however, be cases in which both parties have admitted that the law of the foreign tribunal has been incorrectly declared by its judgment; and where this was expressly stated in the special case by which both litigants were bound, an English Court has refused to give effect to a judgment so pronounced (*x*). Want of due notice in fact to a defendant in a foreign Court is of course more than an irregularity in procedure or error in law; and unless the defendant has agreed to dispense with such notice, this will be a defect fatal to the jurisdiction of the Court pronouncing the judgment (*y*).

The rule that the person of the defendant must be properly subject to the jurisdiction has been put by modern cases in the clearest possible light, and has been summarised in a recent judgment as follows : “ The Courts of this country consider the defendant bound—

- “ (i.) Where he is the subject of the foreign country in which the judgment has been obtained (*z*).
- “ (ii.) Where he was resident in the foreign country when the action began (*a*);
- “ (iii.) Where the defendant, in the character of plaintiff, has selected the *forum* in which he is afterwards sued (*b*);
- “ (iv.) Where he has voluntarily appeared (*c*);

(*u*) Per Lindley, M.R., in *Pemberton v. Hughes*, [1899] 1 Ch. at p. 790, who cites (*inter alia*) Wharton's Conflict of Laws, §§ 801, 812. The phrase quoted *arguendo* in the same case from Story (8th ed. § 607) is not supported by authority, and appears to have been written *alio intuitu*.

(*x*) *Meyer v. Ralli* (1876), 1 C. P. D. 358.

(*y*) *Schibsby v. Westenholz* (1870), 6 Q. B. 155; *Francis Times & Co. v. Carr* (1902), 82 L. T. Rep. 698, and *infra*, p. 601.

(*z*) *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, at p. 371; *Emanuel v. Symon*, [1908] 1 K. B. 302, C. A., per Buckley, L.J., at p. 309. Cf. *Gen. Steam Navig. Co. v. Guillou* (1843), 11 M. & W. 877, at p. 894.

(*a*) *Rousillon v. Rousillon*, *supra*; *Emanuel v. Symon*, *supra*; *Turnbull v. Walker* (1892), 67 L. T. 767; *Carrick v. Hancock* (1895), 12 T. L. R. 59; *Jaffer v. Williams* (1908), 25 T. L. R. 12. Cf. *Calvin's Case* (1608), 7 Co. Rep. 18 a, as to residence and local allegiance. The objection that the defendant was served with process while only temporarily present in the foreign country and that he left immediately afterwards will not be held a valid one.

(*b*) *Rousillon v. Rousillon*, *supra*; *Emanuel v. Symon*, *supra*; *Gen. Steam Navig. Co. v. Guillou*, *supra*, at p. 894 : “ They [the defendants] did not select the tribunal and sue as plaintiffs, in which case the determination might possibly have bound them ” (per Parke, B., cited by Blackburn, J., in *Schibsby v. Westenholz*, at p. 161).

(*c*) *Rousillon v. Rousillon*, *supra*; *Emanuel v. Symon*, *supra*; *Sirdar Singh v. Rajah of Faridkote*, [1894] A. C. 670; *The Challenge*, [1904] P. 41.

“(v.) Where he has contracted to submit himself to the *forum* in which the judgment was obtained (d); and, possibly, if *Becquet v. McCarthy* (1831), 2 B. & Ad. 951, be right;

“(vi.) Where the defendant has real estate within the foreign jurisdiction, in respect of which the cause of action arose while he was within that jurisdiction” (e).

The last-mentioned case cannot now be considered established (f).

A sixth class of cases of actions *in personam* in which the Courts would enforce a foreign judgment has recently been established by Scrutton, J. It arose out of the peculiar character of divorce procedure, when the Courts of the country where the defendant resides could not do justice. Class (vi.) may then be summed up in the following proposition: The Courts of this country will consider the defendant bound where the judgment to be enforced is in proceedings *in personam* ancillary or accessory to the dissolution of a marriage of persons domiciled or otherwise within the jurisdiction of the Court pronouncing the decree, where both the Court pronouncing the judgment and the Court enforcing it are Courts of the same Sovereign, but where the Court enforcing it cannot itself grant the relief because it has not jurisdiction over the marriage to whose dissolution the proceedings are ancillary.

The proposition may be stated more broadly thus: The defendant will be held bound, where the judgment, pronounced and imposed by the Courts of the same Sovereign, is one *in rem* affecting status or one *in personam* ancillary or accessory to such a judgment. Thus in *Phillips v. Batho*, [1913] 3 K. B. 25, the plaintiff, domiciled in British India, presented there a petition for a divorce by reason of his wife's adultery with the present defendant, who was joined as co-respondent. Before the commencement of the suit, the defendant had left India, and though he was served with process in England he did not appear. The plaintiff obtained a decree of divorce, and damages against the defendant. The plaintiff now sued the defendant, who was resident in England, to recover the sum awarded. It was held by Scrutton, J., that the English Courts will recognise and enforce judgments as to status pronounced by the Indian Courts in matters within their jurisdiction, and will also recognise and

(d) *Rousillon v. Rousillon*, *supra*; *Emanuel v. Symon*, *supra*; *Copin v. Adamson* (1874), 9 Exch. 345; *Feyericks v. Hubbard* (1902), 71 L. J. K. B. 509.

(e) Per Fry, J., in *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, 371.

(f) *Becquet v. McCarthy*, however, is practically overruled (so far as this general proposition is concerned) by the judgment in *Sirdar Singh v. Rajah of Faridkote*, [1894] A. C. 670, 685; and case (vi.) put by Fry, J., seems to fall with it.

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enforce ancillary orders as to damages made in such cases, and hence that the plaintiff was entitled to recover.

With regard to head (iv.) above, attempts have been more than once made to narrow the meaning of the words "voluntary appearance"; but it may be now taken as settled that a defendant who appears and contests the suit, from motives of self-interest, is bound by the judgment pronounced in it. Following *De Cosse Brissac v. Rathbone* (1861), 30 L. J. Ex. 238, Wills, J., said in *Voinet v. Barrett* (1885), 54 L. J. Q. B. 521, "Where a defendant appears in the foreign Court and takes his chance of a judgment in his favour, although he appears in consequence of the duress of wishing to protect his property there, which is in the hands of the Court, or which will become liable to seizure in case he does not appear, he cannot afterwards say that he is not bound to submit to a judgment obtained under those circumstances" (g). But the language of the Court of Appeal in the same case (55 L. J. Q. B. 39), taken in conjunction with the words used by Blackburn, J., in *Schibsy v. Westenholz* (*infra*), leads to the conclusion that the language of Wills, J., is not quite correct, so far as the case of an appearance to protect property already seized by the foreign Court is concerned, and that such an appearance will be regarded as involuntary. If, on the other hand, he had appeared before the seizure of the property, although to protect it from being subsequently seized, his appearance would be regarded as voluntary (h).

Upon the same principle, that a litigant who takes his chance of a decision in his favour ought to be bound by a decision against him, it was decided in *Boissière & Co. v. Brookner & Co.* (1889), 6 T. L. R. 85, that an appearance under protest, pleading both to the jurisdiction and to the merits of the case, is a voluntary appearance within this rule, and that the defendant was bound by an adverse judgment. But it was in *Eschger v. Morrison* (1889), 6 T. L. R. 145, held that the appearance of a foreigner as a claimant in an interpleader issue, though the usual terms may be imposed upon him in making the order, does not justify the Court in making him a defendant to a counterclaim. And in *Harris v. Taylor*, [1915] 2 K. B. 580, where the defendant, who was sued in the Isle of Man, appeared "conditionally" and applied to the Court to set aside the order for service out of the jurisdiction and the writ on the ground, *inter alia*, that the defendant was domiciled in England, and the Court dismissed his application, upon the action in England to enforce the judg-

(g) Cf. *Gen. Steam Nav. Co. v. Guillou* (1843), 11 M. & W. 877; 13 L. J. Ex. 168; and *Duflos v. Burlingham* (1880), 43 L. T. 688.

(h) See also *Gaboriau v. Maxwell* (1908), *Times*, Dec. 10.

ment of the High Court of the Isle of Man, it was held that the defendant had voluntarily submitted to the jurisdiction of the Isle of Man Court and that the judgment was therefore enforceable in England (i).

In *Schibsby v. Westenholz* it was held that a judgment of a foreign Court, obtained in default of appearance against a defendant, cannot be enforced in an English Court, where the defendant, at the time the suit commenced, was not a subject of nor resident in the country in which the judgment was obtained; *for there existed nothing imposing any duty on the defendant to obey the judgment of the foreign Court*. "On this point," said Blackburn, J., delivering the opinion of the Court of Queen's Bench, "we think some things are quite clear on principle. If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them. Again, if the defendants had been, at the time when the suit was commenced resident in the country, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them. If at the time when the obligation was contracted the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound them, though before finally deciding this we should like to hear the question argued (k). But every one of these suppositions is negatived in the present case. Again, we think it clear, upon principle, that if a person selected, as plaintiff, the tribunal of a foreign country as the one in which he would sue, he could not afterwards say that the judgment of that tribunal was not binding upon him" (l). With regard to the fifth case put, of submission to the jurisdiction by electing to sue in its tribunals, it is obvious that a plaintiff who has made such a submission cannot be afterwards heard to complain of its acceptance; and it has been held that a foreigner, though not resident or present within the jurisdiction of a domestic tribunal, and without any actual notice or knowledge of its proceedings, may, nevertheless, be taken to have submitted to the jurisdiction as defendant by his previous conduct. In that case the replication alleged that the defendant was holder of shares in a French company, having its legal domicile at Paris, and became thereby subject, by the

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(i) See also *Guiard v. De Clermont*, [1914] 3 K. B. 145.

(k) This *obiter dictum* was discussed in *Sirdar Singh v. Rajah of Faridkote*, [1894] A. C. at p. 685, and as a general proposition was disapproved of by Lord Selborne. See *supra*, on Jurisdiction as to Contracts, pp. 366-7 *seq.*

(l) See to the same effect per Parke, B., in *General Steam Navigation Co. v. Guillou* (1843), 11 M. & W. 877, 894.

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law of France, to all the liabilities belonging to holders of shares, and in particular to the conditions contained in the statutes or articles of association; that by these statutes it was agreed that all disputes arising during liquidation between shareholders should be submitted to the jurisdiction of the French Court; that every shareholder provoking a contest must elect a domicile, and in default election might be made for him at the office of the imperial procurator of the civil tribunal of the department in which the office of the company was situated, and that all summonses and notices should be validly served at the domicile formally or impliedly chosen; that the circumstances arose under which these statutes provided that it should be incumbent upon the defendant to elect a domicile as above, but that he never elected a domicile, and that the plaintiff therefore caused a summons in an action brought in the French Court to be delivered for the defendant at the above-mentioned office; that this service was regular and amounted to notice by the law of France, and that, on default of appearance, judgment was recovered by default against the defendant. This replication was held good by the Court of Exchequer; though a similar replication in the same case, resting the defendant's submission merely upon his having become a member of a French company, and the provisions of the French law, omitting all reference to the statutes or articles of association, was held insufficient by a majority of the Court (*m*). The submission must clearly be deduced from the conduct of the person who is alleged to have submitted, and it would seem that this conduct should be something amounting to a contract or waiver. It is clearly not enough to show that a defendant has entered into business transactions, or become a member of a company, within a foreign country. He is not supposed to know all the law of the foreign country, simply because he enters into commercial relations with it; nor, if he knows it, is he therefore to be regarded as having submitted to its authority. Similarly where a private colonial statute authorised an unincorporated banking company to sue and be sued in the name of its chairman, and provided that execution upon any judgment so obtained against the chairman might be executed upon the goods and chattels of the individual members, it was held that the individual members were bound by a judgment against the chairman obtained in conformity with the statute, although not within the jurisdiction of the colonial Court, nor served with any notice, summons, or process of the

(*m*) *Copin v. Adamson* (1874), 9 Ex. 345; and see the comments on this case in *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, 371.

action against the chairman (*n*). The provisions of the local Act in this case, being the enactment by which the bank was constituted, were clearly regarded, not as part of the general colonial law, but as the private regulations and constitutions of the bank, to which all the members were assenting parties; and the decision is not an authority for the proposition that a person who becomes a member of a foreign company consents by implication to be governed by the general foreign law during his connection with it, though no doubt his submission to that law for certain purposes is complete (*o*). So in *Vallée v. Dumergue* (1849), 4 Ex. 290, the owner of shares in a French company, who was bound by French law to elect a domicile at which all notices of judicial proceedings might be left for him, complied with the French law by electing a domicile in the prescribed forms, and these facts were held without doubt to afford a good answer to a plea that the French judgment against him, on which the action was founded, was obtained during his absence from France, and without any notice to him of the proceedings in the French tribunal. If, in *Copin v. Adamson*, the defendant had shown his knowledge of and acquiescence in the French law by a compliance with its provisions, it would not have been necessary, in order to bind him, to have referred to the statutes or articles of association of the company of which he was a member.

Next, it is now undisputed that a foreign judgment may be avoided by showing that it was obtained by the fraud of the party setting it up (*p*); and the onus of proving the fraud lies on him who alleges it (*q*). It would seem clear that on principle the obligation which arises out of a foreign judgment should be regarded as vitiated by that which with respect to all other obligations prevents a plaintiff from profiting by or insisting on the right which he has legally acquired. The point was distinctly raised before the Court of Appeal in Chancery, and it was put beyond doubt by the judgment of Lord Selborne, that the rule of Equity and Common Law upon it was the same: "It has been suggested that there may be a doubt about the power of a Court of law to give full effect to the allegations of fraud contained in those portions of the bill which relate to the foreign judgment. I should be sorry to think that anything should fall from this Court

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(*n*) *Bank of Australasia v. Harding* (1850), 9 C. B. 661; 19 L. J. C. P. 345.

(*o*) See per Amphlett, B., in *Copin v. Adamson* (1874), 9 Ex. 345, 355.

(*p*) *Godard v. Gray* (1870), 6 Q. B. 139, per Blackburn, J., at p. 149; *Castrique v. Imrie* (1870), 4 H. L. 414, at p. 433; *Abouloff v. Oppenheimer & Co.* (1882), 10 Q. B. D. 295, C. A.; *Manger v. Cash* (1889), 5 T. L. R. 271; *Vadala v. Lawes* (1890), 25 Q. B. D. 310, C. A., per Lindley, L.J., at p. 316.

(*q*) *Henderson v. Henderson* (1844), 6 Q. B. 288; *Robertson v. Struth* (1844), 5 Q. B. 941. Cf. *Pemberton v. Hughes*, [1899] 1 Ch. 781, C. A., per Lindley, M.R., at p. 792.

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which might give the least colour to any doubt as to the power of a Court of law to take cognisance of fraud in obtaining foreign judgments. . . . I say, therefore, without hesitation, that, supposing the fraud to be one provable here, it could be pleaded at law, and would be a legal defence" (r). If, indeed, an English judgment is examinable for fraud, it would appear *a fortiori* that a foreign judgment must be so. A foreign judgment, like all other acts of judicial authority, must be impeachable from without; although it is not permitted to show that the Court was mistaken, it may be shown that it was misled. Fraud is an extrinsic collateral act which vitiates the most solemn proceedings of Courts of justice. In the words of Lord Coke, it avoids all judicial acts, ecclesiastical or temporal (s). Thus, in *Abouloff v. Oppenheimer*, it was held on demurrer to be a good defence to plead that the judgment was obtained by the fraud of the plaintiff in representing to the foreign Court that the goods the subject-matter of the suit were not in his possession, and in concealing that they were in his possession.

So, in *Vadala v. Lawes* (1890), 25 Q. B. D. 310, where an action was brought on a foreign judgment, obtained on certain bills of exchange, and it was alleged that the plaintiff had fraudulently represented the bills to be commercial bills when he knew they were not, it was held that the defendant was at liberty to raise this defence in the action on the judgment, and to show that the foreign Court had been misled by the fraud of the plaintiff.

It is plain that the last two cases cited involve the consequence, that where fraud is alleged, a foreign judgment is examinable upon the merits which have been already tried in the foreign Court. To some extent this is in conflict with the ordinary rule, established by a series of older authorities (t). It is, however, pointed out by Lindley, L.J., in *Vadala v. Lawes*, that in certain cases a conflict between the two rules is inevitable, and must be decided. If one of the parties deceived the

(r) *Ochsenbein v. Papelier* (1873), L. R. 8 Ch. 695. See also, in addition to the cases cited, *Price v. Dewhurst* (1837), 8 Sim. 279, 302; *Bank of Australasia v. Nias* (1851), 16 Q. B. 717, 735; *Cammell v. Sewell* (1858), 3 H. & N. 617, 646; *Castrique v. Imrie* (1870), L. R. 4 H. L. 414, 433; *Abouloff v. Oppenheimer & Co.* (1882), 10 Q. B. D. 295; Story's Conflict of Laws, §§ 603, 607, 608; Buller's N. P. 244, n.

(s) Per De Grey, C.J., in *Duchess of Kingston's Case* (1776), 2 Sm. L. C. (1903), 731.

(t) *Bank of Australasia v. Nias* (1851), 16 Q. B. 717; *Flower v. Lloyd* (1877), 10 Ch. D. 327; *De Medina v. Grove* (1846), 10 Q. B. 152; *Henderson v. Henderson* (1844), 6 Q. B. 288; *Ochsenbein v. Papelier* (1873), L. R. 8 Ch. 695; *Shedden v. Patrick* (1854), 1 Macq. 535; *Prudham v. Phillips, Amb.* 763; *Crawley v. Isaacs* (1867), 16 L. T. (N.S.) 529; *Philipson v. Egremont* (1844), 6 Q. B. 587; *Duchess of Kingston's Case* (1776), 2 Sm. L. C. (1903), 731; *Cammell v. Sewell* (1858), 15 H. & N. 728.

foreign Court by wilfully adducing false evidence, then, in order to examine the judgment for fraud, the evidence must be examined by which the fraud was effected. It was said by Lord Esher, in *Abouloff v. Oppenheimer & Co.*, that he would assume that the evidence given in the foreign action and that proposed to be given in the action on the foreign judgment were to be the same; and that even in that case, the defendant alleging the fraud would be entitled to succeed, if he satisfied the English Court that the allegation was true. But it would appear clear upon principle that the fraud relied upon must be the fraud of the party seeking to enforce the judgment, and committed by him as a party to the foreign action in which the judgment was obtained. The rule is "founded on the doctrine" that no party in an English Court shall be able to take advantage of his own wrongful act; or, as it may be stated, "in other language, that no obligation can be enforced in an English Court of justice which has been procured by the fraud of the person relying upon it as an obligation." The fraud of a witness, not being a party to the suit, and not known to, or connived at, by one of the parties, would be mere perjury; and to question a judgment upon such a ground as that would be to re-open almost every question of fact that the foreign Court had purported to decide. In accordance with this view, it was held in *Martin v. Nicolls* (1830), 3 Sim. 458, that a bill for discovery and a commission to examine witnesses abroad, in aid of the defence to an action brought in this country on a foreign judgment, was demurrable.

Lastly, it is necessary to consider how far a foreign judgment is examinable for error in law. The error in law alleged may be either a mistake by the foreign Court in its own law, or in that of some other country, or in English law, or in international law. There is no authority for saying that the judgment of a foreign Court is examinable on either of the first two grounds, and the fact that an appeal is pending in the foreign tribunals is no defence to an action here (*u*). It has been stated that a foreign judgment will be reviewed here, if based upon an erroneous interpretation either of private international law (*x*) or of English law (*y*); but the later decisions clearly show that this is a misapprehension. There can be no difference, in the

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not examinable for error in law.

(*u*) *Scott v. Pilkington* (1862), 2 B. & S. 11. But, *per curiam* (p. 41), it may afford ground for the equitable interposition of the Court to prevent abuse of its process, and on proper terms to stay execution.

(*x*) *Westlake*, Priv. Int. Law (1922), § 329, citing *Reimers v. Druce* (1857), 23 Beav. 145, 156; *Arnott v. Redfern* (1825), 2 C. & P. 88; *Felix*, 327, n. See *In re Queensland Merc. Co.*, [1892] 1 Ch. 219, as to international law being regarded as part of the law of the Court which adopts it.

(*y*) *Westlake*, Priv. Int. Law (1922), § 329, citing *Novelli v. Rossi* (1831), 2 B. & Ad. 757.

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words of Blackburn, J., between a mistake made by a foreign Court as to English law, and any other mistake, unless it is to be said that a defence which is easily proved is to be admitted, but that one which would give the Court much trouble to investigate is to be rejected; and, accordingly, no foreign judgment can be impeached by showing that it was wrongly arrived at. Nor does it make any difference that the error alleged appears on the face of the proceedings (z). The previous authorities, which had been construed by some writers as deciding that a foreign judgment will be invalidated by showing that it was founded upon a mistaken view of English law, are collected and explained in the valuable judgment of Blackburn, J., in *Castrique v. Imrie* (1870), 4 H. L. 414, delivering the opinion of five of the judges. After stating that fraud would vitiate any obligation, even the obligation imposed by a foreign contract, that there was nothing equivalent to fraud in the case before the Court, and that all that was required of a tribunal that had to decide on a question of foreign law was that it receive and consider the evidence as to the foreign law, and *bona fide* determine on that as well as it can, the learned judge proceeded as follows: "Various cases were cited as authorities that where a foreign Court has mistaken or misapplied the English law, the Courts of this country will not regard the foreign judgment; but we think they do not bear out any such general position. One class of cases—such as *Pollard v. Bell* (1800), 8 T. R. 434; *Bird v. Appleton*, *ibid.* 562; *Dagleish v. Hodgson* (1831), 7 Bing. 495; and others—proceed on a principle not applicable to the present case. A judgment in an English Court is not conclusive as to anything but the point decided, and therefore a judgment of conviction on an indictment for forging a bill of exchange, though conclusive as to the prisoner being a convicted felon, is not only not conclusive, but is not even admissible evidence of the forgery in an action on the bill, though the conviction must have proceeded on the ground that the bill was forged. But, very early in insurance cases a practice began of treating the judgment of a Prize Court condemning a vessel as being the property of an enemy as not only conclusive evidence that the vessel was condemned, which of course it was, but also as conclusive evidence that the vessel was not neutral. There are many cases which proceed on the principle that, where it can be made to appear that the judgment of the Prize Court did not proceed on

(z) *Godard v. Gray* (1870), L. R. 6 Q. B. 151, 152. In *In re Queensland Merc. Agency Co.*, [1892] 1 Ch. 219, where it was conceded that the controversy was to be decided as the Scottish Courts would have decided it, the English Court of Appeal refused to consider whether the Scottish Court would have been right or wrong in so deciding.

the ground that the vessel was an enemy's property, it cannot be conclusive evidence that it was not neutral. In *Lothian v. Henderson* (1803), 3 B. & P., at p. 545, the judgment of the House of Lords was that in a policy on a ship, warranted neutral, a stipulation, that a condemnation should not be conclusive evidence that the vessel was not neutral, was effectual. Lord Eldon, in delivering that judgment, expresses a strong opinion that the practice of receiving the sentences of Prize Courts as conclusive of the collateral matter was originally a mistake. And he also intimates an opinion that the cases just alluded to were attempts to graft a vicious exception on a rule originally vicious, but now become law. It is unnecessary to form or express any opinion on these cases, further than that they proceed on a principle that has no bearing on the present question.

“*Novelli v. Rossi* (1831), 2 B. & Ad. 757, which was relied on, also proceeds on a principle not at all applicable to the present case. It is clear that no judgment of a foreign Court can have any effect unless the subject-matter of the decision (whether *inter partes* or *in rem*) is within the lawful control of the State whose tribunal has pronounced the judgment. In *Novelli v. Rossi* a Frenchman had, at Lyons, drawn a bill on an Englishman in London. The defendant had, at Manchester, indorsed it to the plaintiff. Afterwards the defendant instituted a suit in France to have it declared that he and all prior parties were discharged from their obligations on the bill on account of a cancellation of the acceptance in London by mistake; and, notwithstanding the opposition of the plaintiff, the French Court, on mistaken view of the English law, pronounced a judgment to that effect. But though the French tribunals had jurisdiction to declare that no one should sue on the bill in their Courts, they had none to determine that the plaintiff should not sue in an English Court on an English contract. If they had taken a correct view of the English law there would have been a defence, because such was the English law, not because the French Court had so decided. Being wrong, there was no defence, not because the French Court made a mistake, but because it had no jurisdiction.

“The same principle will, we believe, be found to lie at the bottom of those cases in which our Courts have refused to enforce judgments obtained in a foreign country against a person not resident in that country, and who had no notice of the suit, such as *Buchanan v. Rucker* (1808), 9 East, 192. It may very well be held that the foreign country has no jurisdiction to pronounce judgment against a person behind his back, who is not subject to its jurisdiction; but it is unnecessary to examine these cases;

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for in the present one the ship concerned was clearly within the jurisdiction of the Empire of France; and the plaintiff had notice, and was heard, though unluckily the French Court made a mistake.

“*Simpson v. Fogo* (1860), 1 H. & M. 195, was also cited, but that case proceeded on a principle very different from any applicable to the present case. There a creditor of Messrs. K., the owners of a British ship, obtained in Louisiana a judgment against them, under which their interest in the ship, and no more, was sold under a process exactly analogous to our *feri facias*. There could be no doubt, if that had been all, that the Bank of Liverpool, which held a valid mortgage on the ship, might have taken possession of it as against the purchasers just as much as against the judgment debtors, K. & Co. But the bankers in Liverpool had in Louisiana intervened and endeavoured to prevent the sale of their ship, and a judgment was pronounced against them, on the ground that the Courts in Louisiana wholly disregarded all rights acquired in England on an English ship, unless they were acquired in such a manner as to be valid in Louisiana. The contention before the Vice-Chancellor was that the purchaser of the ship and the bankers in Liverpool were privies to their judgment, and that, therefore, the purchaser was entitled to use it as an estoppel to preclude the bankers from setting up in an English Court their English right, though the judgment proceeded on the ground that the English right was to be wholly disregarded. The Vice-Chancellor decided otherwise. We should be sorry to cast any doubt on a decision which *prima facie* seems to carry out justice and good sense; but all that it is necessary to say in the present case, and therefore all that we do say, is that no such point here arises. The judgment of the French Court decreeing the sale of the vessel was not, according to the view of the facts which we take, a judgment that only the interest of C., if any, in the ship should be sold, but that the particular ship itself should be sold. And finding no authority for saying that the purchaser, under the decree of a foreign Court having competent jurisdiction to decree the transfer, is to be responsible for any mistakes made by that Court either in law or fact, we think we ought to act on the reason given in *Hughes v. Cornelius* (1692), 2 Show. 232: ‘We must not set them at large again, for otherwise the merchants would be in a pleasant condition.’ In truth, the plaintiff asks an English Court to sit as a court of appeal from the French Court, which is not the province of an English Court” (a).

(a) *Castrique v. Imrie* (1870), L. R. 4 H. L. 434-437. See *In re Queens-*

The principles laid down in *Castrique v. Imrie* (1870), 4 H. L. 434, have been in no sense questioned, but in *Meyer v. Ralli*, 1 C. P. D. 358, the Common Pleas Division have held that there is one case where an error in law committed by a foreign Court may be corrected. The case referred to is where both parties admit that the foreign Court has wrongly interpreted its own law. Where such an admission is made, either on the pleadings, special case, or otherwise, the Common Pleas Division held that there was no rule of comity and no principle on which they were called upon to give effect to the foreign judgment; though, strangely enough, Archibald, J., in delivering the decision referred to, expressed a doubt whether *Castrique v. Imrie* would not have compelled the Court to give effect to the foreign decree, if the mistake admitted had been a mistake in the law, not of the country to which the foreign tribunal belonged, but of a third distinct jurisdiction. The correctness of *Meyer v. Ralli* can only rest upon the exceptional circumstance that the error of the foreign Court was admitted upon the special case before the Common Pleas Division (b). The grounds and correctness of the foreign judgment were therefore not examined, nor is the case an authority for the proposition that they are examinable. It may be added that the French judgment impeached appears to have had the additional defect of having been founded on proceedings commenced without any actual summons served or notice in fact given to the defendants; nor does it clearly appear how far service of the summons at the Bar of the Procureur-Impérial was so warranted by the position of the parties as to amount to constructive notice (c).

It may therefore be assumed, from the enunciation of the law by Blackburn, J., in *Castrique v. Imrie* (d), that the judgment of a foreign Court, if final (e), is examinable for no error or mistake, except a mistake by which it gave itself jurisdiction, although by the principles of private international law it would have none. The earlier dicta (f), to the effect that a foreign judgment will be reviewed for any error in private international law, or for any violation of natural justice, would seem, upon examination of

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land Mercantile Co., [1892] 1 Ch. 219, as to an alleged mistake in international law by a Scottish Court.

(b) *Scott v. Pilkington* (1862), 2 B. & S. 11, 41; *Bank of Australasia v. Nias* (1851), 16 Q. B. 717; *Ricardo v. Garcias* (1845), 12 Cl. & F. 368; *Castrique v. Imrie*, *supra*.

(c) *Infra*, p. 613.

(d) *Supra*, p. 606.

(e) *Frayes v. Worms* (1861), 10 C. B. (N.S.) 149; *Plummer v. Woodburne* (1825), 4 B. & C. 625. And a judgment which would not be a bar to further proceedings in the country where it was obtained, between the same parties, is not final: *In re Henderson*; *Nouvion v. Freeman* (1889), 37 Ch. D. 244; (1889), 15 App. Cas. 1.

(f) *Westlake* (1922), § 329.

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the authorities, strictly applicable only to this point. An error in jurisdiction is the only error which a foreign Court is allowed to detect and set right (g). The strongest modern decisions in favour of the theory that no foreign judgment manifestly opposed to natural justice is to be enforced by an English Court are all of earlier date than *Castrique v. Imrie*, and must be taken subject to the principles followed in that case (h). The condition, indeed, on which a foreign judgment shall be accepted here, as stated by Lord Ellenborough in *Buchanan v. Rucker* (1808), 1 Camp. 63; 9 East, 192; namely, that it should appear on the face of it consistent with reason and justice, is said by Blackburn, J., in *Schibsby v. Westenholz*, to be mere declamation. It may be remarked, however, that in the case of *Liverpool Marine Credit Company v. Hunter* (1867), 3 Ch. 479; 4 Eq. 62; which was not referred to or cited in *Castrique v. Imrie*, it was intimated by Lord Chelmsford that, when there had been "a total disregard of the comity of nations," an English Court would be justified in disregarding a judgment "so fraught with injustice"; and similar expressions were used by Lord Hatherley in the same case in the Court of first instance: "If, in examining a judgment, as we are at liberty to do, we find on the face of it that a course of procedure has been adopted which is inconsistent with natural justice, then this Court will not give effect to the decisions and to the authority which it would otherwise be perfectly willing to recognise." This is, no doubt, strong language, but the very next paragraph shows what was in Lord Hatherley's mind, and that his view can really be reconciled with the theory of foreign judgments already deduced from *Castrique v. Imrie*: "It sometimes happens, for instance, that foreign Courts proceed to judgment in the absence of the party against whom proceedings are taken, or after inadequate notice of trial." It is plain that this could only have been said in contemplation of such cases as *Buchanan v. Rucker*, as to which it was expressly said in *Castrique v. Imrie* that the judgment of a foreign Court

(g) The fact, however, that a foreign judgment has been obtained without due notice to the defendant is equivalent to a wrongful assumption of jurisdiction. See the observations of Blackburn, J., upon *Buchanan v. Rucker* in *Castrique v. Imrie*, *supra*, p. 607; *Ferguson v. Mahon* (1839), 11 A. & E. 179; *Reynolds v. Fenton* (1846), 3 C. B. 187; *Copin v. Adamson* (1874), 9 Ex. 345; *Schibsby v. Westenholz* (1870), 6 Q. B. 155.

(h) See the observations on natural justice, with regard to the regular practice of a foreign Court, in *Boissière & Co. v. Brockner & Co.* (1889), 6 T. L. R. 85, per Cave, J.; and in *Bater v. Bater*, [1906] P. 237. Cf. also *Jeannot v. Fuerst* (1909), 25 T. L. R. 424 (where a French judgment was held to accord with natural justice and hence could be sued on here); *Robinson v. Fenner* (1912), 106 L. T. 542, where it was held that a foreign judgment does not necessarily violate natural justice, merely because the foreign Court has arrived at a wrong or unjust decision. In order to render its judgment unenforceable, it must be a decision arrived at in a mode which is unjust according to the conceptions prevailing in this country.

could be reviewed, not because it had made a mistake in law, but because it had acted without jurisdiction (i).

The present editor does not entirely agree with the above view taken by Foote. It is quite true that as a rule it is usually the procedure rather than the decision which is called in question as repugnant to natural justice. But it is submitted that the tendency of modern decisions is to establish the rule that the same principles which are applied in actions on foreign contracts sought to be enforced here, such contracts being in conflict with what are deemed here to be essential principles of justice or morality, should be applied in actions upon foreign judgments, the enforcement of which would be regarded as repugnant to public policy or morality. "If a judgment," said Lord Lindley in *Pemberton v. Hughes*, [1899] 1 Ch. 781, "is pronounced by a foreign Court over persons within its jurisdiction, and in a matter with which it is competent to deal, English Courts never investigate the propriety of the proceedings in the foreign Court, unless they offend against English views of substantial justice. Where no substantial justice, according to English notions, is offended, all that English Courts look to is the finality of the judgment and the jurisdiction of the Court, in this sense and to this extent, namely, its competence to entertain the sort of case which it did deal with, and its competence to require the defendant to appear before it. If the Court had jurisdiction in this sense and to this extent the Courts of this country never inquire whether the jurisdiction has been properly or improperly exercised, provided always that no substantial injustice according to English notions has been committed." This passage was cited with approval by Romer, L.J., in *Bater v. Bater*, [1906] P. 209. Natural justice was defined by Lord Esher in *Voinet v. Barrett* (1885), 55 L. J. Q. B. 41, as "the natural sense of what is right and wrong." As Chief Justice Kotzé said in *Taylor v. Holland*, [1886] 2 K. & B. 78, "We are not bound by international comity to enforce foreign contracts or judgments which violate the policy of our laws."

In *Scarpetta v. Lowenfeld* (1911), 27 T. L. R. 509, it was sought to enforce two judgments obtained in the Courts at Florence. By Italian law neither party to a suit could be called as a witness on his own behalf. It was held by A. T. Lawrence, J., that such exclusion of evidence could not be said to be contrary

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(i) On this subject, cf. also the judgment of the Exchequer Chamber in *Cammell v. Sewell* (1858), 5 H. & N. 728. Other cases in point are *Cavan v. Stewart* (1816), 1 Stark. 525; *Obicini v. Bligh* (1832), 8 Bing. 335; *Frankland v. M'Gusty* (1830), 1 Knapp. 274; *Baring v. Clagett* (1802), 3 B. & B. 215; *Pollard v. Bell* (1800), 8 T. R. 444; *Bolton v. Gladstone* (1804), 2 Taunt. 85; *Price v. Dewhurst* (1837), 8 Sim. 279; *Paul v. Roy* (1852), 15 Beav. 440.

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to substantial justice within the meaning of the rule in *Pemberton v. Hughes*, since until 1846 the same practice obtained in England. Channell, J., however, in *Robinson v. Fenner*, [1913] 3 K. B., declared that "the general statements in the older cases as to not enforcing judgments contrary to natural justice seem now in practice limited to procedure contrary to natural justice." This statement cannot be accepted as correct. "A foreign judgment," state the editors of the Annual Practice, 1925, at p. 21, "that is contrary to public policy or that is founded on a cause of action not recognisable in England will not be enforced, the general principle being that only judgments that rest upon principles of universal acceptance will be enforced."

As Astbury, J., laid down in *In re Macartney; Macfarlane v. Macartney*, [1921] 1 Ch. 522, a foreign judgment founded on a cause of action not recognisable in England or which is contrary to public policy, will not be enforced here. He approved the statement by Fry, J., in *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, that, "If an agreement contrary to the policy of the English law is entered into in a country by the law of which it is valid, an English Court will not enforce it." The action in the present case was not a penal action nor was the cause of action so directly contrary to general morality as on that ground alone to be refused recognition in this country. But it was, however, not only a claim of a character which raised no cause of action in this country but in his judgment its recognition was contrary to public policy, because the general recognition of the permanent rights of illegitimate children and their spinster mothers as recognised in Malta was contrary to the established policy of this country.

It may be added on this part of the subject, that although it is necessary that the foreign Court should have jurisdiction, it is not necessary, in suing on a foreign judgment, to allege that this requisite has been complied with (*k*).

Jurisdiction.

The jurisdiction which entitles the tribunals of any State to pronounce judgment *in personam* arises from its sovereign territorial power. "All jurisdiction is properly territorial, and *extra territorium jus dicenti impune non paretur*. Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it, but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over movables within the territory; and

(*k*) *Robertson v. Struth* (1844), 5 Q. B. 941; *Barber v. Lamb* (1860), 8 C. B. (N.S.) 95.

in questions of status or succession governed by domicile, it may exist as to persons domiciled, or who when living were domiciled within the territory. As between different provinces under one sovereignty, the legislation of the Sovereign may distribute and regulate jurisdiction, but no territorial legislation can give jurisdiction which any foreign Court ought to recognise against foreigners, who owe no allegiance or obedience to the Power which legislates" (l). The jurisdiction over subjects, arising from allegiance, is also territorial in its origin; but it is not in practice exercised in order to enforce personal obligations—at any rate, not by English law. The liability of a defendant to be sued, either in contract or in tort, depends upon other considerations than his nationality (m); but the jurisdiction arising from allegiance is still seen in the rule of practice which provides that service of a writ of summons may in proper cases be ordered upon a British subject abroad, whereas in the case of a foreigner, service of a notice of the writ is substituted (n). Lord Selborne, in the *Faridkote Case* (just cited), goes on to say that in a personal action, to which none of these causes of jurisdiction apply, a decree pronounced *in absentem*, by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity.

Closely akin to the question of jurisdiction, with regard to which it has thus been shown that a foreign judgment has been declared by a consensus of authorities to be examinable, is that of *notice to the defendant*. The fact that no notice, or no sufficient notice, was given to the defendant of the proceedings on which the judgment was founded may be an incident, of course, of the want of jurisdiction referred to, or an element of fraud—the presence of fraud being, as has been stated, sufficient of itself to deprive a judgment so obtained of all validity (o). Thus, if a defendant is not resident in nor a subject of a foreign country, nor present within its territorial limits, and has no notice of an action brought against him in its tribunals, it is plain that the absence of notice is merged, so to speak, in the absence of jurisdiction, which would be amply sufficient to invalidate the judgment, even if notice was in fact given. But if a defendant is subject to the foreign jurisdiction, either by domicile or submission, and, according to the older opinions, even

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defendant.

(l) *Sirdar Singh v. Faridkote (Rajah of)*, [1894] A. C. at p. 683, per Lord Selborne.

(m) See, as to jurisdiction in contracts, pp. 358-75 *seq.*; as to torts, pp. 512-7 *seq.*

(n) This is formally expressed in the C. L. P. Act (1852), ss. 18, 19; and remains the practice under the Judicature Act, 1875, and Rules (Order xi.).

(o) *Buchanan v. Rucker* (1807), 1 Camp. 63; (1808). 9 East, 192. Cf. *The Duc d'Aumale*, [1903] P., per Mathew, L.J., at p. 24, C. A.

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by nationality, he is of course subject to its laws; and though he has no *actual* notice of an action commenced against him in its tribunals, and may not have been served with any writ or process, he may have had *constructive* notice which will satisfy those laws, and be accepted by foreign tribunals as sufficient. If those laws, for instance, provide that notice may be effected on an absent defendant by nailing a copy of the declaration on the court-house door (*p*), or by service at the office of a public officer (*q*), or by any other notice in law which cannot be said to be notice in fact, those who are properly subject to those laws will be bound by them, and no other; for, as Lord Ellenborough said in *Buchanan v. Rucker*, they can never be intended for or applied to persons who, for aught that appears, were never present within or subject to the jurisdiction. This subjection or submission to the jurisdiction, as has been already implied, does not depend solely upon the domicile or residence of the defendant, but may be inferred from his acts, where they show an intention to submit, for the purposes of a particular transaction, to the foreign law and the methods of service which it adopts. Such a submission has been implied where a person has joined a foreign company, the statutes or articles of association of which contained special provisions authorizing constructive notice of process or action by something which would not or might not be notice in fact (*r*): but it appears not to be sufficient that the law of the country to which the foreign company belongs should contain such provisions, if the rules or articles of the company itself do not repeat or adopt them (*s*). So, the acceptor in a foreign country of a bill drawn and payable there, though not subject to the jurisdiction by domicile, nationality, or residence, was held to have submitted himself to it in an action on the bill itself, so as to be bound by a judgment obtained in the foreign tribunal without actual notice or service to the defendant, but in compliance with the requirements of the foreign law as to service and notice (*t*). In the later case of *Schibsby v. Westenholz* (*u*), a foreign judgment was held invalid on the ground that the defendants were not subject to the jurisdiction by residence, transient presence, or any other reason, and that there therefore existed nothing which imposed upon them any duty to obey the

(*p*) *Buchanan v. Rucker* (1806), 9 East, 192.

(*q*) *Schibsby v. Westenholz* (1870), 6 Q. B. 155.

(*r*) *Copin v. Adamson* (1874), 9 Ex. 345; *Bank of Australasia v. Harding* (1850), 9 C. B. 661; 19 L. J. C. P. 345; *Vallée v. Dumergue* (1849), 4 Ex. 290.

(*s*) Per Amplett and Pigott, BB. (Kelly, C.B., *dissentiente*), in *Copin v. Adamson*.

(*t*) *Meus v. Thellusson* (1853), 8 Ex. 638.

(*u*) (1870), L. R. 6 Q. B. 155; *Godard v. Gray*, *ibid.* p. 139. Followed in *Voinet v. Barrett* (1885), 54 L. J. Q. B. 521.

obligation which the judgment created. In that case, though no personal service of process or summons had been effected on the defendants, notice had been in fact received by the defendants through the French consul in the country where the defendants resided, service having been effected in accordance with the French law at the office of the procureur-impérial. The defendants had, therefore, notice of process in the eye of the foreign law, and notice in fact; but they were not subject to the jurisdiction, and therefore the question of notice became immaterial, as there was no foundation for the action at all. In *Reynolds v. Fenton* (1846), 3 C. B. 187, a plea alleging that the defendant had received no formal notice, by service of process or otherwise, of the action, was held bad; but in that case it was not alleged that the defendant was not subject, by domicile or otherwise, to the jurisdiction, or even that he had not in fact knowledge and notice of the proceedings. The dicta, therefore, to be found in the course of the argument, to the effect that the question for the Court was whether the judgment was obtained contrary to natural justice, and that this was not shown by the plea, are sufficiently justified by the meagreness of its allegations. It is true that in *Ferguson v. Mahon* (x), decided before the case last cited, a similar plea was held good, the judgment sued on being an Irish one; but there the question of jurisdiction by general subjection does not appear to have been disputed or suggested to the Court, the sole point being whether the Irish proceedings were regular. Lord Denman said that the question was whether the judgment was passed under such circumstances as to show that the Court had properly jurisdiction over the party; and when it appeared that the defendant had never received notice of the proceeding, or been before the Court, it was impossible to allow the judgment to be made the foundation of an action in England. It will be observed that in this case the plea was construed as amounting to an allegation that the defendant had neither received notice in fact of the proceedings, nor constructive notice according to the regulations of a law to which he was properly subject, and the decision must not be viewed as any authority for supposing that knowledge or notice in fact is absolutely necessary, if the defendant is subject or has submitted himself to the local law, and that local law provides a substitute or equivalent for such knowledge or notice. This subjection is, in fact, the test of jurisdiction in the eye of the English law; which, as pointed out by Westlake (y), recognises

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and notice to
defendant.

(x) (1839), 11 A. & E. 179. See also *Cowan v. Braidwood* (1840), 1 M. & G. 882; 2 Scott, N. R. 138; *Douglas v. Forrest* (1828), 4 Bing. 686; *Smith v. Nicolls* (1889), 5 N. C. 208; 7 Scott, 147; *Guinness v. Carroll*, 1 B. & Ad. 459.
(y) Priv. Int. Law (1922), § 321.

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the competence of the *forum rei*, certainly by domicile or residence, if not by allegiance also (*z*). And it has already been stated that a defendant who "voluntarily appears" in a foreign action is taken as having submitted himself to the jurisdiction, and is consequently bound by the judgment pronounced by the foreign Court; although his motive in appearing may have been only the desire to protect property belonging to himself which was within the jurisdiction or reach of the foreign Court (*a*).

It has thus been seen that error in law, whether domestic, foreign, or international, is not in itself a ground on which a judgment can be reviewed in a foreign Court, unless such error involve an assumption of jurisdiction in violation of ordinary international principles, or the Court pronouncing the judgment has proceeded without due notice against a party who is neither bound nor has consented to accept any substitute for notice in fact which the Court may have deemed sufficient. So far as these requirements are based upon natural justice, the dicta that a foreign judgment contrary to natural justice cannot be recognised may be supported, but there seems no ground for extending them further (*b*). Error in law having thus been disposed of, error in fact, as a ground for impeaching a foreign judgment, must next be considered; and as to this it may be said shortly that a foreign judgment, both in respect of the issues of fact found and the grounds on which the findings were arrived at, is now admitted to be conclusive (*c*). On this point, however, there has long been a conflict of opinion, and the question has in fact been so involved with the alleged right to examine foreign judgments on other grounds, which has just been discussed, that it is not easy to distinguish the decisions strictly applicable to it. The authorities in opposition to the now accepted opinion, that a foreign judgment is conclusive as to the facts on which it pronounces, will first be recapitulated.

It was stated by Eyre, C.J., in *Phillips v. Hunter* (1795), 2 H. Bl. 410, that a foreign judgment, though it cannot be examined under ordinary circumstances by an English Court, yet is so examinable when the party who claims the benefit of it applies to an English Court to enforce it; and that under such circumstances it is treated as matter *in pais*, as consideration *prima facie* sufficient to raise a promise. It may be pointed out at once, however, that this distinction has received no modern

Error in
fact.

Foreign
judgment—
when
examinable.

(*z*) *Douglas v. Forrest* (1828), 4 Bing. 686, 703.

(*a*) *Rousillon v. Rousillon* (1880), 14 Ch. D. 351; *Voinet v. Barrett* (1885), 54 L. J. Q. B. 521; affirmed 55 L. J. Q. B. 39; *De Cosse Brissac v. Rathbone* (1861), 30 L. J. Ex. 238, and *supra*, p. 600.

(*b*) Cf. *Robinson v. Fenner* (1912), 106 L. T. 542, and see the note added thereto, *supra*, p. 610, n. (*h*).

(*c*) *Godard v. Gray* (1870), 6 Q. B. 139, 149, and *infra*.

recognition, and that the theory of a foreign judgment being merely *prima facie* evidence of a promise supported by consideration, is now exploded. "It is difficult to understand," said Blackburn, J., in *Godard v. Gray*, "how the common course of pleading is consistent with any notion that the judgment was only evidence. If that were so, every count on a foreign judgment must be demurrable on that ground. The mode of pleading shows that the judgment was considered, not as merely *prima facie* evidence of that cause of action for which the judgment was given, but as in itself giving rise, at least *prima facie*, to a legal obligation to obey that judgment and pay the sum adjudged. This may seem a technical mode of dealing with the question, but in truth it goes to the root of the matter. For if the judgment were merely considered as evidence of the original cause of action, it must be open to meet it by any counter evidence negating the existence of that original cause of action."

In *Houlditch v. Donegal* (1834), 8 Bligh (N.S.) 301 (d), which is perhaps the strongest authority in favour of the liability of foreign judgments to review, Lord Brougham expressed his opinion in very plain terms that a foreign judgment may be given in evidence, and made the subject of proceedings in another court or country, "but that it may be met by contrary evidence, and the subject-matter of the judgment is liable to be inquired into. . . . In my judgment, it has always hitherto been recognised in Westminster Hall that the judgments of foreign Courts are traversable, may be averred against, and are only *prima facie* evidence in actions to support which they are given in evidence" (e). The language of the same learned judge in *Don v. Lippmann* (f) is in effect to the same purpose, inasmuch as he there cites authorities to show that English Courts regard a foreign judgment only as *prima facie* evidence of a debt; and in *Houlditch v. Donegal* other authorities were referred to, showing that the opinions of Lord Mansfield, Buller and Bayley, JJ. (g), coincided with the view he then took of the subject. In *Galbraith v. Neville* a resolution of the House of Lords was cited, which declared that a judgment of the Supreme Court of Jamaica ought to be received as evidence, *prima facie*, of the debt for which it had been given, and that it lay upon the defendant to

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(d) It is noticeable that the summary procedure to obtain judgment given by Order XIV., under the Judicature Acts, has been held to be applicable to an action on a foreign judgment: *Grant v. Easton* (1883), 13 Q. B. D. 302; and cf. *Hodsoll v. Baxter* (1858), E. B. & E. 884.

(e) This judgment is cited to illustrate the growth of the present theory, though it must be regarded as overruled.

(f) (1837), 5 Cl. & F. 1, 20, 21, citing *Fraser v. Sinclair* (1771), Morr. 4543.

(g) *Walker v. Witter* (1778), 1 Dougl. 1; *Galbraith v. Neville* (1789), 1 Dougl. 5; *Tarleton v. Tarleton* (1815), 4 M. & S. 20.

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Foreign
judgment—
conclusive
as to facts.

impeach the justice thereof, or to show the same to have been irregularly or unduly obtained (*h*). This dictum was expressly followed by Best, C.J., in *Arnott v. Redfern*, 2 Sm. L. C., [1903] 796, but, as has been pointed out, it was only adopted to the extent of admitting a foreign judgment as at all events *prima facie* evidence. The point there was not whether a foreign judgment could be contradicted on a question of fact, but whether, if uncontradicted, it was sufficient to establish a cause of action.

The foregoing are the principal authorities to be found for the theory, now undoubtedly exploded, that foreign judgments, properly obtained, are *prima facie* evidence only of the facts to which they relate. There are, on the other hand, abundant contemporaneous dicta in favour of regarding them as conclusive, which recent authorities render it unnecessary to examine in detail (*i*). In 1845 it was stated by Lord Campbell in the House of Lords that, at common law, foreign judgments, between the same parties and on the same matters, were evidence only, but that they had been held to be conclusive in a Chancery case by Vice-Chancellor Shadwell (*k*). The cause then before the House of Lords was an appeal from the same judge, but Lord Campbell in his judgment drew no distinction between Common Law and Equity on this question. "A foreign judgment," he says, "may be pleaded as *res judicata*, because the foreign tribunal has clearly jurisdiction over the matter; and both parties having been regularly brought before the foreign tribunal, and that tribunal having adjudged between them, I think that such a judgment would be a bar to a subsequent suit in this country for the same cause." In this judgment a sounder distinction than that between Equity and Common Law is in fact indicated. There is an important difference between the position of a plaintiff who seeks by action to enforce a judgment which he has obtained from a foreign tribunal, and that of a defendant who claims the protection here of a foreign judgment already given in his favour. In the latter case, as Story points out, the party who has been defeated abroad, after a fair hearing by a competent Court, has no right to institute a new suit elsewhere, and thus to bring the matter again into controversy. The other party is not to lose the protection which the foreign judgment

(*h*) H. L. March 4, 1871, cited in the *Duchess of Kingston's Case* (1776), 11 Harg. St. Tr. 122; see also per Lord Mansfield in *Moses v. Macfarlane* (1760), 2 Burr. 1005.

(*i*) *Boucher v. Lawson* (1734), Cas. temp. Hardwicke, 89; *Kennedy v. Cassilis*, 2 Swanst. 326, n.; *Galbraith v. Neville* (1789), 1 Dougl. 5 (per Lord Kenyon); *Tarleton v. Tarleton* (1815), 4 M. & S. 21 (per Lord Ellenborough); *Martin v. Nicolls* (1830), 3 Sim. 458; *Smith v. Nicolls* (1839), 5 Bing. N. C. 221; *Ferguson v. Mahon* (1839), 11 A. & E. 179.

(*k*) *Ricardo v. Garcias* (1845), 12 Cl. & F. 368, 384, 401; *Martin v. Nicolls* (1830), 3 Sim. 458.

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gave him (l). Accordingly, it was held, in more than one case, even by those who most strenuously urged the liability of foreign judgments to review when a plaintiff sought to enforce them here, that they were absolutely conclusive as to the facts involved in them and the grounds on which they rested, when pleaded in bar (m). The state of the law with reference to this distinction was clearly expressed by Lord Romilly in 1857: "In the numerous authorities that bear on this subject, a distinction is also taken between the cases where the foreign judgment is brought before the cognisance of an English Court upon an application by the successful party to enforce and obtain the fruits of it against the defendant, and those cases where the defendant here sets up the foreign judgment as a bar to the proceedings instituted by the person who has failed against the same defendant with reference to the same subject-matter. In *Phillips v. Hunter*, Eyre, C.J., considered that distinction to rest upon this principle: that as, in the former case, the judgment is submitted voluntarily to the Court, the question arises, whether it is sufficient as a consideration to raise a promise, and that thereupon it must be examined as all other considerations for promises are examined, and that evidence of the foreign law is admissible to show that the judgment was or was not warranted; but that it is otherwise in the case of a defence; that the party living abroad is not entitled to sue the successful defendant again in another country for the same subject-matter, but that the protection of a foreign judgment is complete everywhere, as well as in the place where it was pronounced. This distinction has certainly not been carried out to the extent laid down by Eyre, C.J.; still it is a distinction which has so much authority to support it that it must be regarded, at least to some extent, in considering the value of a foreign judgment here" (n).

So far as regards the liability of a foreign judgment for review on the facts, it has been already intimated that this distinction need no longer be regarded. In *Henderson v. Henderson* (1844), 6 Q. B. 288, it was clearly laid down by Lord Denman that the principle of English law which assumed the judgment of a foreign Court to be in accordance with justice, "steered clear of an inquiry into the merits of the case upon the facts found; for whatever constituted a defence in that court ought to have

(l) Story, *Conflict of Laws*, § 598. As to pleading a foreign judgment pronounced *pendente lite*, as a defence arising after action brought, see *post*, p. 628.

(m) *Burrows v. Jemino* (1726), 2 Str. 733, cited *Cas. temp. Hardwicke*, 87; *Boucher v. Lawson* (1734), *Cas. temp. Hardwicke*, 80; *Tarleton v. Tarleton* (1815), 4 M. & S. 20; and see especially per Eyre, C.J., in *Phillips v. Hunter* (1795), 2 H. Bl. 402, 410.

(n) *Reimers v. Druce* (1857), 23 Beav. 149, 150, per Lord Romilly, M.R.

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been pleaded there." Judgment was accordingly given for the plaintiff, who was suing on a judgment obtained in Newfoundland and had demurred to the defendant's pleas alleging that the case there had been wrongly decided upon the facts. So in 1851, in *Bank of Australasia v. Nias* (1851), 16 Q. B. 717, which was an action brought to enforce a colonial judgment, the defendant pleaded certain pleas denying the promises upon which the original action was brought, and also alleging that these promises were obtained by the fraud and covin of the plaintiffs. It was held by Lord Campbell, delivering the judgment of the Queen's Bench, that these pleas were bad, and that the facts alleged by them were not to be re-tried in an English Court. "The pleas demurred to," said the Chief Justice, "must now be taken to have been in due manner decided against the defendant. . . . It seems contrary to principle and expediency for the same questions to be again submitted to a jury in this country." Nor is the fact that the judgment on which the action was brought was a colonial judgment, subject to review by the Judicial Committee of the Privy Council, of any importance with regard to the decision on this point. It is suggested by the judgment that there are even greater difficulties in the way of impeaching the competence or integrity of a colonial Court than of a foreign one, from which no appeal lay to a British Court; but this refers rather to cases where want of jurisdiction or fraud is imputed, and not to those where it is sought to re-try a question of fact already settled by a foreign tribunal; nor has any such distinction as that suggested between a judgment obtained in a British colony, and a foreign judgment proper, been recognised in modern cases (o).

On the authorities above cited, the question whether a foreign judgment can be impeached as erroneous upon the merits came before the Court of Exchequer in *De Cosse Brissac v. Rathbone* (1861), 6 H. & N. 301, the plaintiff, as in most of the cases, bringing his action on the judgment which it was sought to review, but it was held that the question was no longer open. It was suggested by Martin, B., in that case that, though the Courts of first instance were concluded by the authorities, the point might possibly be reconsidered in a court of error, but that course was not adopted; and in *Godard v. Gray* (1870), 6 Q. B., at p. 150, the present law on the subject was laid down by Blackburn, J., in even less equivocal terms: "The decisions seem to us to leave it no longer open to contend, unless in a court of error, that a foreign judgment can be impeached on the

(o) See *Bank of Australasia v. Harding* (1850), 9 C. B. 661.

ground that it was erroneous on the merits, or to set up as a defence to an action on it, that the tribunal mistook either the facts or the law. . . . The defendant can no more set up as an excuse, that the judgment proceeded on a mistake as to English law, than he could set up as an excuse that there had been a mistake as to the law of some third country incidentally involved, or as to any other question of fact."

The earlier theory, therefore, indicated in *Phillips v. Hunter* (1795), 2 H. Bl. 402, and other cases, that a foreign judgment was examinable when it was sought to enforce it, but conclusive when a defendant sought its protection, and the distinction between these two modes of bringing such a judgment into question may be regarded as having given way to this simpler principle—that a foreign judgment is not examinable at all in either of these two cases (*p*), except where it is sought to prove a wrongful assumption of jurisdiction by the tribunal which pronounced it, or a procedure without notice to the person affected by it—the required notice being not necessarily notice in fact, if the defendant is bound or has consented or submitted to accept anything less as a substitute. It will be seen that this degree of validity was given from the first to judgments relied on by way of defence; and it would appear from more recent cases, which have been cited above, that a foreign judgment, when made a ground of action, is entitled to equal respect. It has been said, nevertheless, that a judgment abroad, pending a general administration of the debtor's estate in England, will be treated by the English Court as only *prima facie* evidence of the debt. It does not appear, however, that this point was essential to the decision (*q*).

The cases hitherto mentioned have been either instances of a plaintiff successful abroad, attempting to enforce his judgment here, or of a defendant, successful abroad, attempting to use the foreign judgment in his favour as a protection. The case may be supposed, however, of a plaintiff who has obtained a foreign judgment in his favour, but for a less amount than he conceives to be due to him, and who therefore claims to sue in an English Court upon his original cause of action. That he can sue upon his original cause of action has been already stated, inasmuch as there is no merger of such original cause in a foreign judgment (*r*), but the judgment, if *satisfied*, may nevertheless be

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Conclusive-
ness of
foreign
judgment.

Satisfied
judgment
pleaded in
answer to
further
action
by same
plaintiff.

(*p*) See, further, as to the finality of foreign judgments, in the absence of the impeachable grounds already considered, *Scarpetta v. Lowenfeld* (1911), 27 T. L. R. 509. (*q*) *Re Boyse; Crofton v. Crofton* (1880), 15 Ch. D. 591.

(*r*) *Smith v. Nicolls* (1839), 5 Bing. N. C. 208; *Hall v. Odber* (1809), 11 East, 124; *Kelsall v. Marshall* (1856), 1 C. B. (N.S.) 241; *Castrique v. Behrens* (1861), 30 L. J. Q. B. 163; *Barber v. Lamb* (1860), 8 C. B. (N.S.) 95.

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pleaded in bar of the claim as a satisfaction (s). It may be more correct to say that in such a case the amount actually paid in accordance with the foreign judgment may be pleaded as payment, the plaintiff being estopped by the judgment itself from showing that more was in fact due. Unless such an estoppel arose, the plea would, of course, be defeated by showing a claim for a larger amount, on the principle that payment of part is no satisfaction of the whole (t). The position of the parties is in fact analogous to that occupied by plaintiff and defendant who have chosen to refer their differences to arbitration. Where a party has obtained the decision of an arbitrator in his favour, and his adversary has paid the amount, it would be manifestly contrary to reason and justice to allow the successful party to endeavour to obtain a better judgment in respect of the same subject-matter from some other tribunal (u).

Enforce-
ment of
colonial
judgments.

Part II. of the Administration of Justice Act, 1920, 10 & 11 Geo. 5, c. 81, provides for the enforcement in the United Kingdom of judgments obtained in any superior Court in any part of his Majesty's dominions outside the United Kingdom. The judgment creditor may apply to the High Court in England or Ireland (*i.e.*, Northern Ireland) or to the Court of Session in Scotland, at any time within twelve months from the date of the judgment or such longer period as may be allowed by the Court, to have the judgment registered in the Court. On such application the Court may in its discretion order the judgment to be registered. Registration is subject to the conditions contained in the Act. When registered such judgments are of the same force and effect, and proceedings may be taken thereon, as if they were English judgments. For the text of the Act see App. A.

(ii.) FOREIGN JUDGMENTS IN REM.

Judgments
in rem con-
clusive as
against
strangers.

The consideration of the present subject has hitherto been confined to foreign judgments against the person, which are, of course, notwithstanding some ambiguous expressions to the contrary (x), only entitled to recognition as creating an obligation in proceedings between the same parties or privies; nor will a foreign judgment *in personam* be enforced in England by proceedings *in rem* (y). Where the litigants are not the same, such a judgment is plainly *res inter alios acta*, and is not, except under

(s) *Barber v. Lamb* (1860), 8 C. B. (N.S.) 95.

(t) *Cumber v. Wane* (1721), 1 Sm. L. C. (1903), 338, and cases there cited.

(u) *Per Erle, C.J.* (1860), 8 C. B. (N.S.) 100.

(x) *Tarleton v. Tarleton* (1815), 4 M. & S. 21; *Houlditch v. Donegal* (1834), 8 Bligh, N. R. 301, 341.

(y) *The City of Mecca* (1881), 6 P. D. 106; 49 L. J. Adm. 17.

very special circumstances, admissible in evidence at all (z). There is, however, another class of judgments which is entitled to wider recognition, though it may be sometimes difficult to decide to which class a particular judgment belongs. A judgment *in rem*, or a decree which changes or settles the ownership of immovable or movable property is, subject to certain conditions as to the jurisdiction of the Court, conclusive not only against the parties to the original action, but as against all the world (a). That the principle which allows a foreign judgment to be impeached for fraud (b) applies to judgments *in rem* with the same certainty as to judgments *in personam* is of course indisputable (c); but in the absence of fraud, the only requisite necessary to the validity and conclusiveness of a foreign judgment *in rem* is that it should have been pronounced by a competent Court having actual jurisdiction over the subject-matter (d). The necessity of jurisdiction as a foundation for every judicial act has already been laid down with respect to judgments generally; it being indispensable, adopting the words of Story, § 586, to establish that the Court pronouncing the judgment should have had lawful jurisdiction over the cause, over the thing, and over the parties. In ordinary actions and judgments *in personam* the necessity of jurisdiction over any particular thing does not arise. The decision of a tribunal between two parties, in personal actions, though in general binding between parties and privies, does not affect the rights of third parties. If in execution of the judgment in such an action process issues against the property of one of the litigants, and some particular thing is sold as being his property, the rights of third persons are in no way affected. The tribunal had neither jurisdiction to determine, nor did it determine, anything more than that the litigant's property should be sold, and it does not do more than sell his interest, if any, in the property seized in execution. It is constantly seen in the English common law courts, that where the sheriff has seized and sold a particular chattel under a *fiery facias* against A., B. may set up a claim to that chattel, notwithstanding the sale,

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(z) *Castrique v. Imrie* (1870), 4 H. L. 427. For estoppel through privies in blood, law, or estate, by judgments, see note to *Duchess of Kingston's Case*, 2 Sm. L. C. (1903), 760.

(a) *Minna Craig Steamship Co. v. Chartered Bank of India* (1897), 66 L. J. Q. B. 162; *Ballantyne v. Mackinnon*, [1896] 2 Q. B. 455; *Castrique v. Imrie* (1870), 4 H. L. 414.

(b) *Supra*, p. 603; *Ochsenbein v. Papelier* (1873), 8 Ch. 695; *Abouloff v. Oppenheimer* (1882), 10 Q. B. D. 295.

(c) *Shand v. Du Boisson* (1874), L. R. 18 Eq. 283; *Messina v. Petrocchino* (1872), L. R. 4 P. C. 144, 157.

(d) *The Flad Oyen* (1799), 8 T. R. 270; *Havelock v. Rockwood* (1799), 8 T. R. 276; *Donaldson v. Thompson* (1808), 1 Camp. 429; *Oddy v. Bovil* (1797), 7 T. R. 523.

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Judgments.

*Judgments
in rem—
adjudication
on owner-
ship.*

either against the sheriff or the purchaser from the sheriff. And if this may be done in the Courts of the country where the judgment was pronounced, it follows of course that it may be done in a foreign country (*e*). But when the tribunal has jurisdiction to determine not merely on the rights of the parties, but also on the disposition of a particular thing, and does in the exercise of that jurisdiction direct that the thing itself, and not merely the interest of any particular person in it, be sold and transferred, the case is very different (*f*). In such a case the judgment is not *in personam*, but *in rem*; and in its adjudication on the status or ownership of that thing is, as has just been said, conclusive against all the world, binding “in all courts, and against all persons” (*g*). Such a judgment is not, however, even as between the parties, pleadable as an estoppel, which is perhaps the only safe doctrine to be deduced from the decision in *Simpson v. Fogo*, a case which has been often cited as at variance with the principles which have been already enunciated (*h*). In *Simpson v. Fogo*, a creditor of the owners of a British ship obtained in Louisiana a judgment against them under which their interest in the ship, and no more, was sold under process of execution. The Bank of Liverpool, who had at the time a mortgage on the ship valid according to English law, intervened in the Louisiana proceedings, and a judgment was pronounced against them, on the ground that the law of Louisiana ignored all rights, even though acquired in England in an English ship, before the vessel had passed into the jurisdiction of Louisiana, that had not been acquired according to Louisiana law. It was held that the Bank of Liverpool were, nevertheless, not estopped from setting up their right as mortgagees in an English Court; and inasmuch as the Louisiana Court did ultimately pronounce as to the ownership of and entire proprietary right in a ship which was at the time within its territorial jurisdiction, though that decision was not originally necessary to the suit, and would probably not have been given if the Bank of Liverpool had not intervened, it is difficult to see how the subsequent English decision can be reconciled with the theory of the conclusiveness of foreign judgments *in rem* which has just been stated, or with the more important cases in the

(*e*) Per Blackburn, J., in *Castrique v. Imrie* (1870), 4 H. L. at p. 427.

(*f*) *Ibid.*

(*g*) *Hobbs v. Hinning* (1865), 17 C. B. (N.S.) 791; *Castrique v. Imrie* (1870), *supra*; *The City of Mecca* (1881), 6 P. D. 106, at p. 112; *Ballantyne v. Mackinnon*, [1896] 2 Q. B. 455, C. A.; *Minna Craig Steamship Co. v. Chartered Mercantile Bank of India, London, and China*, [1897] 1 Q. B. 55.

(*h*) *Simpson v. Fogo* (1860), 29 L. J. Ch. 657; *Hobbs v. Henning*, *supra*.

superior English Courts which have followed it (i). The judgment was, no doubt, influenced by the consideration that the Louisiana Court had taken an entirely erroneous view, according to the principles of private international law, of their power to ignore a proprietary right which had once well accrued (k); a defect for which it has often been contended that a foreign judgment may be successfully impeached (*supra*, p. 609).

Accepting, then, as incontrovertible the principle that a foreign judgment *in rem* is conclusive in all Courts and against all parties, it remains to consider to what its conclusiveness has been held to extend. As to the facts directly adjudicated upon there can be no doubt; but there is often difficulty in applying the principle to facts inferentially decided, as well as to the grounds, expressed or implied, of the foreign decision. The safest expression of the English law on this subject appears to be that the truth of every fact, which the foreign Court has found, either as part of its actual adjudication or as one of the stated grounds of that decision, must be taken to be conclusively established (l). Thus, in *Minna Craig S.S. Co. v. Chartered Bank of India* (1897), 66 L. J. Q. B. 162 (m), the master of a British ship was induced by fraud to give bills of lading at Bombay for goods which in fact were never shipped. On arrival in a German port, proceedings were there taken against the ship on behalf of *bona fide* indorsees of the bills of lading. By order of the German Court, the ship was sold, and the indorsees of the bills of lading were declared to be entitled to so much of the proceeds as represented the value of the goods described in the bills of lading. It was held, in an action brought against them in England on behalf of the liquidator of the owners, that the judgment of the German Court in effect declared that a lien upon the ship, to that extent, was created by the act of the master in giving the bills of lading, and was conclusive.

The judgment relied on, however, must clearly be a judgment upon the point in controversy. Thus the judgment of a French Court of Admiralty, condemning a ship as prize, was held not to be conclusive as to the question of neutrality in an action against the underwriters, as the judgment itself did not state its foundation, and it was shown that it might have proceeded on another ground; viz., the violation of the French law by

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Judgments.

Judgment
in rem—
conclusive
as to adjudication and
stated
grounds of
decision.

(i) *Cammell v. Sewell* (1858), 3 H. & N. 640; 5 H. & N. 728; *Castrique v. Imrie* (1870), 4 H. L. 414.

(k) *Supra*, p. 289; *Cammell v. Sewell* (1858), 5 H. & N. 728.

(l) *Hobbs v. Henning* (1865), 17 C. B. (n.s.) 791, 825; *Kindersley v. Chase* (1801), Park Ins. 490; *Baring v. Clagett* (1802), 3 B. & P. 214; *Bolton v. Gladstone* (1804), 5 East, 160; *Blad v. Bamfield* (1673), 3 Swanst. 60.

(m) Following *Ballantyne v. Mackinnon*, [1896] 2 Q. B. 455.

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throwing overboard the ship's papers (*n*). It was said in a subsequent case that, where no other possible ground of condemnation was shown to the Court by evidence, the foreign condemnation was to be taken as conclusive that the ship was enemies' property (*o*); but the truer doctrine would seem to be that the foreign Court will not be taken as having established any fact which it has not expressly found and laid down in the judgment relied on (*p*). No presumption as to the grounds upon which it proceeded will therefore be made by another tribunal. And even an express finding on a question of fact, not necessary to the actual decree, will be regarded as inconclusive before another tribunal. Thus, it not being necessary to show domicile within the jurisdiction, in order to obtain probate (*q*), a finding as to domicile in a decree granting probate is inconclusive on that point (*r*).

Judgment—
when not
examinable
for fraud.

It was said above that a foreign judgment *in rem* can, like any other, be impeached for fraud (*s*); but it is clear that the fraud alleged must not be something which might have been raised as a defence in the foreign Court upon the facts which were then before it. To impeach a foreign judgment on such grounds as that would be to allow a plea which ought to have been pleaded in the action on which the judgment was founded (*t*). Thus an action will not lie for conspiracy to obtain a foreign judgment *in rem* against the plaintiff, unless it appears at any rate that the plaintiff had no notice of the foreign action, or that the questions upon which the truth of his allegations of conspiracy rest were not raised or determined by it (*u*).

(iii.) FOREIGN JUDGMENTS ON STATUS.

Judgments
on status
of persons.

How far a foreign judgment on a question of fact or law affecting the status of a person is analogous to a foreign judgment *in rem*, determining the ownership of a particular thing, is doubtful. It has been seen that a judgment *in rem* can only claim recognition abroad when pronounced by a tribunal which had jurisdiction over the subject-matter, the jurisdiction in that case being ascertained by the easily applied test of local situation.

(*n*) *Bernardi v. Motteux* (1781), 2 Dougl. 575.

(*o*) *Saloucci v. Woodmass* (1784) Park Ins. 362.

(*p*) *Hobbs v. Henning* (1865), 17 C. B. (N.S.) 791; *Fisher v. Ogle* (1808), 1 Camp. 418; *Dagleish v. Hodgson* (1831), 7 Bing. 504; and see per Lord Eldon in *Lothian v. Henderson* (1803), 3 B. & P. 544.

(*q*) *Whicker v. Hume* (1858), 7 H. L. C. 124, 156.

(*r*) *Concha v. Concha* (1892), 11 App. Cas. 541.

(*s*) *Supra*, p. 603.

(*t*) *Bowles v. Orr* (1835), 1 Y. & C. Ex. 464; *Innes v. Mitchell* (1846), 4 Drew. 102; *Castrique v. Behrens* (1861), 30 L. J. Q. B. 163.

(*u*) *Castrique v. Behrens* (1861), 30 L. J. Q. B. 163; *Bank of Australasia v. Nias* (1851), 16 Q. B. 717.

The question whether a particular tribunal has jurisdiction over the status of a particular person, depending as it does upon mixed considerations of nationality, domicile, and transient presence within certain territorial limits, is a far more complex one, and has already been discussed when treating of personal status. There is, however, one characteristic common to foreign judgments *in rem* and on status. If the latter are accepted at all, and so far as they are accepted, by an English Court the action in which they are relied on need not be brought for the same purpose and on the same cause as the foreign suit in which they were originally pronounced (*Doglioni v. Crispin* (1886), 1 H. L. 301; S. C. 35 L. J. P. & M. 135). Nor, according to the judgment of Lord Cranworth in this case, is it necessary that the action should be between the parties *in the same character*; inasmuch as the judgment is not relied on as showing that the demand is *res judicata* between two persons, but as the decision of a Court of exclusive jurisdiction on subject-matter within that jurisdiction, a decision which another Court is bound to receive without inquiry as to its conformity or nonconformity with the laws of the country where it was pronounced. The same reasoning would seem to show that it need not be a judgment between the same parties at all, a principle which with regard to judgments *in rem* is well established (*supra*, p. 623). And if a decree of divorce be considered as a judgment on status—which is probably the most correct way of regarding it—there can be no doubt that its validity, if recognised at all, will be recognised in suits other than those between the former husband and wife. Thus, the validity of a Scots divorce was examined by the House of Lords in a suit brought by the children of a second marriage of the mother; and, if it had been held that the Scots Court had had jurisdiction to pronounce it, there can be no doubt that it would have been accepted as conclusive (x). Sentences of divorce, indeed, are oftenest called into question to prove or disprove the legitimacy of certain persons descended from one of the divorced pair. With regard to the competency of a foreign Court to decree a divorce, in the several cases where the original marriage was or was not celebrated within the jurisdiction, and where the parties were or were not domiciled there at the time of the marriage and of its dissolution, it is unnecessary to repeat what has already been said (*supra*, p. 141). But if the Court which decreed the divorce had jurisdiction to make such a decree, according to the estimate formed by English law of that jurisdiction, it is certain that such a foreign judg-

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Divorce and
legitimacy.

(x) *Shaw v. Gould* (1868), 3 H. L. 55; *Shaw v. Attorney-General* (1870), 2 P. & D. 156.

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ment will receive full recognition here as conclusive and binding, whether in a suit between the same parties or between strangers to the original decree (y). Judgments upon the status of a person are, in fact, regarded as closely akin to judgments upon the status or ownership of a thing. But foreign judgments on status will not be held binding in this country, if the status is penal or, generally, is such as English law refuses to recognise (z). "The rule," says Erle, C.J., "making the decision of a Court which creates the status of a person or thing conclusive upon all persons as to the existence of that status, has been regarded as salutary. Sentences of nullity of marriage in the Ecclesiastical Courts, of forfeiture in the Exchequer, of settlement of paupers by the quarter sessions, and of prize in Prize Courts are examples" (a). The word "creates," as used by Erle, C.J., in the passage quoted, must of course be taken to include the essential requisite of jurisdiction, without which there would be no creation which a foreign Court would recognise, either of status in such an action as is there referred to, or of a right and obligation in an action *in personam*.

(iv.) LIS ALIBI PENDENS.

Plea of *lis
alibi
pendens*.

Closely analogous to the subject of foreign judgments is the plea of *lis alibi pendens*, as to which it is only necessary to say that it is a good defence only where the two Courts have concurrent jurisdiction under the same sovereign authority (b), in which case, however, the statutory relation between the Courts, or the terms in which the sovereign authority is delegated, will in most instances modify the general principle. The amalgamation of the various English Courts into the High Court of Justice, by the operation of the Judicature Acts, 1873 and 1875, will deprive the subject of much practical interest in England for the future (c). It may be added that the pendency of an action in an inferior Court was never pleadable, in abatement or bar,

(y) *Roach v. Garvan* (1748), 1 Ves. 157; *Kennedy v. Cassilis*, 2 Swanst. 313.

(z) Cf. *Worms v. De Valdor* (1880), 49 L. J. Ch. 261; *Re Selot's Trusts*, [1902] 1 Ch 488; and see also *Huntington v. Attrill*, [1893] A. C. 150.

(a) *Hobbs v. Henning* (1865), 17 C. B. (N.S.) 791, 823; see *Hughes v. Cornelius* (1692), 2 Show. 232; 2 Sm. L. C. 741; and notes to *Doe v. Oliver*, *ibid.*, 724. As to the recognition by Court of Chancery of a judgment of the Ecclesiastical Court in 1834 on the validity of a will, see *Douglas v. Cooper* (1834), 3 My. & K. 378. See further as to foreign judgments concerning a question of status, *Re Trufort*; *Trafford v. Blanc* (1887), 36 Ch. D. 600; *Bater v. Bater*, [1906] P. 209, C. A.

(b) *Ostell v. Lepage* (1851), 5 De G. & S. 95, 105.

(c) See on this subject, Comyn's Dig. tit. "Abatement," H. 24; Bac. Abr. tit. "Abatement," M.; *Mayor of London v. B.*, 3 Keb. 491; *Freem.* 401; *Gilbert's Hist. of C. P.* p. 254.

to one in a superior (d). And even where the two Courts have concurrent jurisdiction under the same sovereign authority, so that neither is, in the strict sense of the word, foreign to the other, the plea of *lis alibi pendens* was never held available where the one suit was originally in *personam* and the other in *rem*, though the subject-matter of the second suit might have been collaterally attached or effected by the first. The two suits must, to render the plea a good one, be in their nature the same (e). The plea that another action is pending in a strictly foreign Court for the same cause, when the tribunal before which the plea is raised has undoubtedly jurisdiction over the subject-matter, is in no case an available defence. "It would be no answer, even in abatement of the writ, that an action was pending here in an inferior Court, and how in law or reason can it be that it is pending in a foreign Court, when the action is in no sense local?" (f). The authorities referred to show that the *dictum* of Lord Cottenham in *Wedderburn v. Wedderburn* (1840), 4 My. & Cr., at p. 596, which has been cited for the opposite theory, cannot be regarded as law (g); and it may now be taken as established that no decree or order of a foreign tribunal, and *a fortiori* no proceeding or suit pending there, can be pleaded in an English Court, except a final and conclusive judgment, pronounced by a Court of competent jurisdiction (h). It has been held, however, that the matter must have been *res judicata* in the foreign Court at the time when the action was commenced in the English one; and the fact that there was at the commencement of the English suit a *lis alibi pendens* abroad, on which judgment was given in time to be pleaded in England, was not admitted as a defence in the latter suit (i). In such a case it was said that the proper course for the party objecting to being harassed by two suits is to apply to the English Court to put the other litigant to his election, by compelling him to abandon one or the other of the suits (k). But

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Suit pending
in foreign
court.

(d) 5 Co. 62 a; 2 Lord Raymond, 1102; Comyn's Dig. tit. "Abatement," H. 24, 9.

(e) *Harmer v. Bell* (1851), 7 Moo. P. C. 267, 286.

(f) Per Pollock, C.B., in *Scott v. Seymour* (1862), 1 H. & C. 219, 229; *Cox v. Mitchell* (1859), 7 C. B. (N.S.) 55; *Ostell v. Lepage* (1851), 5 De G. & S. 95, 105; *Bayley v. Edwards* (1782), 3 Swanst. 703; *Maule v. Murray* (1797), 7 T. R. 470; *Dillon v. Alvares* (1798), 4 Ves. 357. Cf. *Jopson v. James*, [1908] 77 L. J. Ch. 824, C. A., where considerations of international comity are emphasised.

(g) Cf. *Hyman v. Helm* (1883), 24 Ch. D. 531, C. A., at p. 538; *Re Bryan*, [1904] 20 T. L. R. 290.

(h) *Supra*, p. 595; *Ricardo v. Garcias* (1845), 14 Sim. 265; S. C. 12 Cl. & F. 380, and cases cited at p. 389; *Frayes v. Worms* (1861), 10 C. B. (N.S.) 149; *Plummer v. Woodburne* (1825), 4 B. & C. 625; *Smith v. Nicolls* (1839), 5 Bing. N. C. 208.

(i) *The Delta, The Erminia Foscolo* (1876), 1 P. D. 393.

(k) *The Catterina Chiazzare* (1876), 1 P. D. 368; *The Mali Ivo* (1869), L. R. 2 A. & E. 356; *The Delta* (1876), 1 P. D. 393, 404.

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in *Houston v. Sligo* (1885), 29 Ch. D. 448, Pearson, J., said that, however right the decision in *The Delta* may have been under the old practice, he was not satisfied, without a closer examination of the rules of Court, that a defendant was not now at liberty to set up as *res judicata* a decision of the point at issue by a Court of competent jurisdiction during the process of the action (l). Nor does there seem any reason for the distinction, the right of a defendant to plead a defence arising since action brought being now only a question of costs (m). But the mere fact that an appeal is pending abroad against the foreign judgment does not deprive the judgment itself of the force of *res judicata* in an English Court (n).

With regard to the general question of restraining proceedings in a foreign tribunal, it is plain that an English Court can only take this course effectively when the litigant to be restrained is either also litigating before the English Court, or is domiciled within English jurisdiction. It has been already pointed out that in a proper case proceedings in a foreign Court, even against foreign immovables, may be restrained (o); and where an estate is being generally administered in England, there is no doubt that an English creditor can be restrained from proceeding before a foreign tribunal (p). So persons who have appeared as petitioners, or have proved as creditors, in the winding-up of a company, will be restrained from taking foreign proceedings to get hold of assets properly divisible in the winding-up (q). When such creditor, however, is domiciled abroad, and is not also proceeding, or withdraws from his proceedings, in the English Court, an injunction would be ineffective, and will not be granted (r). In the last case it was said that a foreign judgment so obtained could only be treated in England as *prima facie* evidence of the debt; though it does not appear that this *dictum* was essential to the judgment. As to the ordinary case of one of the parties to an action in England instituting proceedings at the same time before a foreign tribunal, it must be shown, in order to obtain the interference of an English Court, that the multiplicity of actions is vexatious and oppressive (s).

(l) Cf. Order xxiv. rr. 1, 2, 3.

(m) R. S. C., Order xxiv. rr. 1, 2, 3.

(n) *Munro v. Pilkington*, 31 L. J. Q. B. 81; *Castrique v. Behrens* (1861), 30 L. J. Q. B. 163.

(o) *Ex parte Rogers, In re Boustead* (1881), 16 Ch. D. 665.

(p) *Graham v. Maxwell* (1844), 1 Macn. & G. 71. Cf. *In re Queensland Merc. Co.* (1891), W. N. 62.

(q) *In re Belfast Shipowners' Co.* (1894), 1 Ir. Rep. 321; *In re Oriental Inland Steam Co.* (1874), 8 Ch. 557, distinguishing the case of *Moor v. Anglo-Italian Bank* (1879), 10 Ch. D. 681, as relating to immovables.

(r) *In re Boyse; Crofton v. Crofton* (1880), 15 Ch. D. 591.

(s) As to the meaning of "vexatious and oppressive," see *Logan v. Bank of Scotland* (No. 2), [1906] 1 K. B. 141, C. A., *per curiam*, at p. 151, *seq.*;

Each case, it was said in *McHenry v. Lewis* (1882), 22 Ch. D. 397, will be considered on its own particular merits. And the applicant does not satisfy the burden of proof by merely showing that there is a multiplicity of actions (*t*). It is not vexatious to bring an action in each country where there are substantial reasons of benefit to the plaintiff. Commenting on the decision in *McHenry v. Lewis* as to how far the plaintiff may be ordered to elect between English and foreign actions, Lindley, L.J., said in *Peruvian Guano Co. v. Buckwoldt* (1883), 23 Ch. D. 230, "That case appears to me to be a most valuable decision. As I understand it, it comes to this, that when the plaintiff is suing in this country and also abroad in respect of the same matter, and a motion is made to compel the plaintiff to elect, it is not sufficient for the person so moving to point out that there are two proceedings being taken with reference to the same matter, he must go further and show that there is vexation in point of fact, that is to say, that there is no necessity for harassing the defendant by double litigation. Moreover I think the Court ought to be very cautious before it interferes in cases of that kind, and for this reason: The Court here is not and cannot be alive to all the advantages which a person may expect to derive from suing in a foreign Court. This Court does not know with accuracy, unless the matter is brought to its attention, what reasons there may be for preferring one Court to another. If in any case it is established that there is nothing except vexatious litigation, there is ample jurisdiction in this Court to make the order asked."

It has been suggested by the Courts that a distinction should be made between the proceedings brought within the British Empire and those in foreign countries. But in *Cohen v. Rothfield*, [1919] 1 K. B. 410, where two parties had cross-claims arising out of the same transactions for substantially the same relief, one commenced an action in Scotland and the other in England. The Court of Appeal refused to restrain the plaintiff in the Scottish action from proceeding with his action, holding that it is incumbent on the party seeking to restrain the other to show that the proceeding of which he complains is oppressive or vexatious and that the party instituting it can gain no advantage therefrom. "Within the English Courts," said Scrutton, L.J., "two actions by the same plaintiff relating to the same subject matter may be *prima facie* vexatious but this *prima facie* case does not exist where one action is out of the

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The Hagen, [1908] P. 189, C. A.; *Re Norton's Settlement*; *Norton v. Norton*, [1908] 1 Ch. 471, C. A.

(*t*) *Hyman v. Helm* (1883), 24 Ch. D. 531, 537; *Ostell v. Lepage* (1851), 5 De G. & S. 95; 2 De G. M. & G. 892.

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King's dominions and the Court is not necessarily aware of the advantages of the foreign procedure." Does the same rule of procedure, asked the learned Lord Justice, "apply where the action to be stayed is not abroad, but in another Court in the King's dominions, as in Scotland, Ireland or the colonies?" It appeared to him that unless the applicant satisfies the Court that no advantage can be gained by the defendant by proceeding with the action in which he is plaintiff in another part of the King's dominions, the Court should not stop him from proceeding with the only proceedings which he, as plaintiff, can control, A wife's suit against her husband in this country will not be stayed merely because a foreign suit for divorce has been instituted abroad by the husband (*u*). The defendant applying for an injunction must show that the plaintiff could get no advantage whatever by the action abroad greater than he could get by the action in England (*x*), or at any rate that there is some equity as against the plaintiff which requires the English Court to stay the foreign action (*y*).

And when an action instituted in France involved the same questions between the same parties as an action in England, but the special relief sought by the French action could only be obtained in France, the Court of Appeal refused to stay the foreign suit (*z*).

The proof of foreign judgments is provided for by 14 & 15 Vict. c. 99, s. 7 (*a*).

(v.) FOREIGN AWARDS.

Enforcement
of English
awards.

Before considering the methods by which the awards of a foreign arbitral tribunal may be enforced in England it is desirable to state briefly those by which English awards may be enforced. By s. 12 of the Arbitration Act, 1889, 52 & 53 Vict. c. 49, "an award on a submission may, by leave of the Court or a judge, be enforced in the same manner as a judgment order to the same effect." That is to say, where an award has definitely settled the rights and liabilities of the parties so that they cannot be further litigated either party may ask under the section that judgment may issue on the award. But the section does not convert the award into a judgment: it merely gives to an award the same status as a judgment for

(*u*) *Thornton v. Thornton* (1886), 11 P. D. 176, C. A.; cf. *Von. Eckhardstein v. Von Eckhardstein* (1907), 23 T. L. R. 539, 593, C. A.

(*x*) Per Brett, M.R., 24 Ch. D. at p. 538.

(*y*) *Fletcher v. Rodgers* (1878), 27 W. R. 97. Cf. *Cox v. Mitchell* (1859), 7 C. B. (N.S.) 55.

(*z*) *Baird v. Prescott* (1890), 6 T. L. R. 231.

(*a*) See *supra*, chap. x., *ad fin.* p. 578.

the purpose of enforcement and leaves it as it originally was, an award. Consequently the party who has obtained leave to enforce the award as a judgment may nevertheless bring an action on the award. An order having been obtained under the section, execution thereon may then be enforced. And if execution has been levied against the debtor by seizure of his goods under process following upon an order against him to enforce an award as a judgment, he commits an act of bankruptcy within the meaning of the Bankruptcy Act, 1914.

But an award will not be enforced as a judgment (1) when the submission is by parole; (2) when the award ascertains only the amount to be paid; (3) where the validity of the award or the right to proceed upon it is doubtful; (4) where the award is one giving compensation for land taken under the Lands Clauses Acts; and (5) where the award is made under a statute which expressly provides how it is to be enforced.

First then a submission to come within section 12 of the Act, must be in writing. Secondly, the award must not only ascertain the amount to be paid but also determine the liability in law of the person to pay. Consequently, if there is no adjudication as to the liability of the person who is called upon to pay, the section does not apply. Thirdly, where the validity of the award is open to question, leave to enforce will not be granted, as where, for instance, the arbitrators in making their award have exceeded their jurisdiction. Fourthly, under the Lands Clauses Acts an action is the proper remedy. In all these circumstances, therefore, the award must be enforced by action. Lastly, where express provision for enforcement is made by statute the particular procedure indicated must be followed, as, for instance, where compensation is awarded under s. 150 of the Public Health Act, the local authority must proceed before justices to recover the amount awarded in a summary way.

But leave to enforce an award against the Crown will not be granted. See the recent case of *Grech v. The Board of Trade* (1923) 130 L. T. 15.

Where the award is good on the face of it, the parties cannot object to the decision of the arbitrator either upon the law or upon the facts. But where an error of fact or law appears on the fact of the award, it will be set aside by the Court. "The law," said Williams, J., in *Hodgkinson v. Fernie* (1857), 3 C. B. (N.S.) 189, "has for many years been settled, and remains so at this day, that where a cause or matters of difference are referred to an arbitrator, whether lawyer or layman, he is constituted the sole and final judge of all questions both of law and of fact. . . . The only exceptions to that rule are cases where

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the award is the result of corruption or fraud and one other, which though it is to be regretted, is now, I think, firmly established, viz., where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award." This doctrine was accepted by Lord Haldane, L.C., in *British Westinghouse Electric & Manufacturing Co. v. Underground Electric Rails Co.*, [1912] A. C. 673.

The application to the Court for leave to enforce an award is made in both the King's Bench and Chancery Divisions by an originating summons before a Master in Chambers. This summons must be served personally on the respondent unless otherwise ordered by the Court, but it cannot be served out of the jurisdiction. In the Chancery Division the application may also be made by motion. Applications to the Chancery Division are rarely made. The award may be enforced at any time, although the time for moving to set it aside has not yet elapsed. If the defendant is out of the jurisdiction it is necessary to bring an action. From the decision of the Master an appeal lies to the Judge in Chambers and from such Judge to the Court of Appeal.

The successful party to an award may also sue upon it as upon a judgment or decree and may in some cases obtain a decree for its specific performance.

Disobedience to an award which under the Arbitration Act has the effect of a rule of Court, may also be punished by committal for contempt of Court.

But attachment in order to enforce the award is now rarely used, since a summons or motion for leave to enforce is a more direct and simpler method of procedure and moreover no person may now be arrested or imprisoned for debt. But where the award directs the performance of some act other than the payment of money the Court may make an order of attachment. If the validity of the award is in doubt the Court will refuse such an order. But by the common law if an action is brought to enforce a right which has already been the subject of a valid award between the parties, the award is a good plea to the action. The defendant, however, must not only plead the award but also that he has performed its provisions.

It is true that the Courts, prior to the Arbitration Act, 1889, in their desire to avoid injustice have in special circumstances set aside awards which were on the face of them good. But since the Act empowers the arbitrator to correct a clerical mistake or error in his award or empowers the parties to compel the arbitrator to state a case to the Court on any question of law,

the Courts now adhere to the general rule not to set aside awards which are good on the face.

And where the rules of an association or chamber to which the parties agree to submit all disputes, prohibit the parties from applying to the arbitrator to state a case for the opinion of the Court on any question of law arising in the course of the reference, such rules are *ultra vires*. In *Czarnikow & Co., Ltd. v. Roth, Schmidt & Co.* (1922), 127 L. T. R. 824, such a prohibition was contained in the Rules of the Refined Sugar Association, to the council of which the parties had made submission.

Although requested by the buyers to state a case for the opinion of the Court the arbitrators refused. This was, as Lord Sterndale, M. R., said, to oust the jurisdiction of the Court, and consequently the rule was against public policy and void. As Atkin, L.J., explained, "an agreement that the rights of the parties shall be determined by arbitration as a condition precedent to an action is not an agreement ousting the jurisdiction of the Court. There is no cause of action, and therefore no jurisdiction, until an award is made, and when made, the Courts have complete jurisdiction." All the judges concurred in declaring that to permit commercial arbitrators to determine disputes according to their own views, in other words to act outside the law, would be contrary to public policy.

"I think," said Scrutton, L.J., "commercial men will be making a great mistake if they ignore the importance of administering settled principles of law in commercial disputes and trust to the judgment of business men, however experienced in business, based only on the facts of each particular case and with no knowledge of or guidance in the principles of law which must control the facts and which arbitrators must administer."

A fundamental distinction between the English law and the law of Scotland may be here mentioned. The English common law doctrine—swept away by the Arbitration Act, 1889—that a contract to oust the jurisdiction of the Courts was against public policy and invalid, never obtained in Scotland. "In the same way," said Lord Dunedin in *Sanderson & Sons v. Armour & Co. Ltd.* (1922), 127 L. T. J. 597, "the right which in England pertains to the Court under the said Act to apply or not to apply the arbitration clause in its discretion never was the right of the Court in Scotland. If the parties have contracted to arbitrate, to arbitration they must go."

In some of the British overseas possessions leave to enforce an English award as a judgment will be given in the same manner as in England.

In a few of the Colonies, such as South Australia, Cape Colony,

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the Transvaal, the Orange Free State, and the Yukon Territory, an English award may be enforced by leave of the Court as if it were a judgment. Elsewhere it can only be enforced by action. In a few Continental States, such as Germany, Denmark, Sweden, some Cantons in Switzerland, Portugal, Greece, Roumania, Mexico, Brazil and Belgium, an English award may be enforced as a judgment, but subject always to the observance of certain specified conditions.

By s. 5 of the Arbitration Act, 1889, the Court is empowered in certain circumstances to appoint an arbitrator, umpire or third arbitrator. Where there has been a failure to appoint "if the appointment is not made within seven clear days after the service of the notice, the Court or a judge may, on application by the party who gave the notice, appoint an arbitrator, umpire or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by the consent of all parties."

It was held by the Court of Appeal in *In re Eyre & Corporation of Leicester*, [1892] 1 Q. B. 136, where both the parties to the dispute were British, that in that particular case "may" means "must" and that the Court had no discretion and was bound to appoint an arbitrator. In concurring, Kay, L.J., said he did not intend to bind himself with regard to the question whether the word "may" in the section might not in certain cases give a discretion to the Court. He conceived that cases might arise where it would be necessary to exercise some discretion. And so in *Ouse Shipbuilding Co., Ltd. v. Bjornstad* (1924), 40 L. T. R. 636, where the plaintiffs were two Norwegians resident out of the jurisdiction, the Court of Appeal held that the Court in such circumstances had a discretion to refuse to appoint an arbitrator, and therefore could attach any reasonable condition to the grant of the application. The respondents were therefore ordered to give security for costs of the arbitration and of the appeal within one month, upon the fulfilment of which the order to appoint an arbitrator to stand.

Further powers in the appointment of arbitrators are conferred by s. 16 of the Administration of Justice Act, 1920. For the text see Appendix A. But certain admitted defects in the Arbitration Act still remain to be remedied. At the instigation of the International Arbitration Courts Committee of the International Law Association a clause was proposed in the Administration of Justice Bill, 1924, which owing to the sudden dissolution of Parliament failed to become law. The clause provides (a) that a submission to arbitration shall not be revoked by the death of one of the parties thereto; (b) that the Court shall have

power to issue a commission to take evidence abroad in the case of an arbitration as it has in the case of an action (a); and (c) that the Court shall have power in the case where an appointed arbitrator neglects to act to remove him and appoint another person in his place.

Turning to the enforcement of foreign awards in England, an award by foreign arbitrators which required an enforcement order to render it enforceable by the foreign law, is not a judgment of a foreign tribunal which can be enforced by action in the English Courts. In *Merrifield Ziegler & Co. v. Liverpool Cotton Association* (1911), 105 L. T. 97, Eve, J., refused to grant leave to enforce an award made in Germany although its validity as between the parties could not be impeached, because the stage had not been reached at which the award became enforceable in Germany. Consequently the learned judge held that the award was not the existing judgment of a foreign tribunal which an English Court could enforce.

A foreign award, to be enforceable in England, must therefore be recognised by some competent Court in the foreign State as a final judgment—*chose jugée*. And since it is thus a judgment the proper procedure in England to enforce it is by action. The proceedings in such action are therefore governed by the law applicable to the enforcement of foreign judgments. But as we have seen, in no branch of Private International Law has there been more diversity of opinion both amongst jurists and judges of the same and various nations as to the force and effect to be given to foreign judgments.

Under the State of New York Arbitration Act, 1920, where there is failure on the part of one of the parties to a submission, the other party can only proceed provided he makes an application to the Court and the Court gives him permission to proceed with the arbitration in accordance with the terms of the submission. Accordingly in *Bankers and Shippers Insurance Company of New York v. Liverpool Marine and General Insurance Co. Ltd.* (1924), 19 Lloyds List Law Rep. 335, where the plaintiff had omitted to make such an application, Bailhache, J., held that the award was a nullity according to the law of the State of New York and therefore could not be enforced here.

In 1892 the London Chamber of Arbitration was established by the City Corporation under the control of a joint committee of the Corporation and the London Chamber of Commerce.

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(a) It was held in *In re An Arbitration, Shaw & Ronaldson*, [1892] 1 Q. B. 91, that where parties agree to refer their disputes to arbitration, no action in respect thereof having been brought, the Court or a judge has no power under Order xxxvii., r. 5, to order the issue of a commission for the examination of witnesses in the matter referred to arbitration.

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Submissions to this tribunal may be heard by one arbitrator, two arbitrators and an umpire, or three arbitrators. But with the provision, in 1895, in the High Court, of a Commercial Court for the despatch of commercial business "in accordance with the existing rules and orders," the need for the London Chamber was somewhat diminished.

Nevertheless this tribunal, reconstituted in 1905 as the London Court of Arbitration, has dealt with a large number of cases with marked success. It deals with agreements made in the grain, coal, metal, timber and produce markets which contain special arbitration clauses referring disputes relating to the interpretation of the agreement, claims in respect of delivery or short delivery of goods, questions of quality and questions of partnership. The jurisdiction of the Court has not been confined to persons in the United Kingdom, but has been accepted by parties in China, France, Greece, India, Italy, Switzerland and the United States. The success of Courts of arbitration established by provincial chambers of commerce such as Manchester and Bradford has been equally marked. The latest development has been the creation of a Court of Arbitration by the International Chamber of Commerce in Paris. This Court provides for three modes of procedure for the settlement of commercial disputes, viz., (1) Conciliation by the Chairman of the Administrative Commission, assisted by one or more members of the Commission; (2) Arbitration by the Court of Arbitration of the International Chamber of Commerce in cases where at least one of the parties is a national of a State which does not provide a legal sanction for the execution of arbitral awards; and (3) Arbitration by the Court of Arbitration of the International Chamber in cases where all the parties are nationals of States which do provide such sanction.

Rules of procedure for all three modes have been adopted.

Of the two movements on foot, English opinion appears to favour that for the extension of the reciprocal recognition of arbitral awards, of which the Franco-Belgian Convention of 1899 constitutes at least one precedent which might well be followed.

The chief hindrance, perhaps, to reciprocity, is the lack in many States of a speedy and cheap procedure for the enforcement of awards. In neither the majority of the Continental Courts nor in the American—with the exception of those in the State of New York—is the validity of an award recognised. At the Stockholm Conference, 1924, of the International Law Association it was resolved that "it is desirable that awards made in any civilised country should be enforceable in any other." By the Protocol on Arbitration Clauses signed on behalf of Great Britain

on 23rd September, 1923, the contracting States agreed to recognise the validity of agreements to submit to arbitration differences relating to commercial matters or to any other matters capable of settlement by arbitration; to facilitate all arbitral proceedings in their respective territories; and to ensure the execution of arbitral awards in accordance with the provisions of their respective national laws. These clauses have been embodied in the Arbitration Clauses (Protocol) Act, 1924, 14 & 15 Geo. 5, c. 39, for the text of which see Appendix B. By s. 1, notwithstanding anything in the Arbitration Act, 1889, the Court may stay any legal proceedings in respect of matters to be referred to arbitration under any agreement to which the Protocol applies.

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APPENDIX (A).

Administration of Justice Act, 1920.

10 & 11 GEO. 5, c. 81.

PART I.

Amendment
as to
Admiralty
jurisdiction
of High
Court.

5.—(1) The Admiralty jurisdiction of the High Court shall, subject to the provisions of this section, extend to—

- (a) any claim arising out of an agreement relating to the use or hire of a ship; and (b)
- (b) any claim relating to the carriage of goods in any ship; and
- (c) any claim in tort in respect of goods carried in any ship:

Provided that—

- (i) this section shall not apply in any case in which it is shown to the court that at the time of the institution of the proceedings any owner or part owner of the ship was domiciled in England or Wales; and

- (ii) if in any proceedings under this section the plaintiff recovers a less amount than twenty pounds, he shall not be entitled to any costs of the proceedings, or, if in any such proceedings the plaintiff recovers a less amount than three hundred pounds, he shall not be entitled to any more costs than those to which he would have been entitled if the proceedings had been brought in a county court, unless in either case the court or a judge certifies that there was sufficient reason for bringing the proceedings in the High Court (c).

(2) The jurisdiction conferred by this section may be exercised either in proceedings in rem or in proceedings in personam.

Power to
make rules
as to proof.

6. The power to make rules conferred by the Judicature Acts, 1873 to 1910, shall include power to make rules for regulating the means by which particular facts may be proved, and the mode in which evidence thereof may be given, in any proceedings or on any application in connection with or at any stage of any proceedings.

PART II.

RECIPROCAL ENFORCEMENT OF JUDGMENTS IN THE UNITED KINGDOM
AND IN OTHER PARTS OF HIS MAJESTY'S DOMINIONS.

Enforcement
in the United
Kingdom of
judgments
obtained in
superior
courts in
other British
dominions.

9.—(1) Where a judgment has been obtained in a superior court in any part of His Majesty's dominions outside the United Kingdom to which this Part of this Act extends, the judgment creditor may apply to the High Court in England or Ireland, or to the Court of

(b) See *The Montrosa*, [1917] P. 1.

(c) These three classes extend the provisions of the Admiralty Act, 1861, 24 Vict. c. 10, s. 6, the decisions under which apply unless they are opposed to the above amendments. See the *Marlborough Hill*, [1921] A. C. 444.

Session in Scotland, at any time within twelve months after the date of the judgment, or such longer period as may be allowed by the court, to have the judgment registered in the court, and on any such application the court may, if in all the circumstances of the case they think it is just and convenient that the judgment should be enforced in the United Kingdom, and subject to the provisions of this section, order the judgment to be registered accordingly.

(2) No judgment shall be ordered to be registered under this section if—

- (a) the original court acted without jurisdiction; or
- (b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court; or
- (c) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court; or
- (d) the judgment was obtained by fraud; or
- (e) the judgment debtor satisfies the registering court either that an appeal is pending, or that he is entitled and intends to appeal, against the judgment; or
- (f) the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the registering court.

(3) Where a judgment is registered under this section—

- (a) the judgment shall, as from the date of registration, be of the same force and effect, and proceedings may be taken thereon, as if it had been a judgment originally obtained or entered up on the date of registration in the registering court;
- (b) the registering court shall have the same control and jurisdiction over the judgment as it has over similar judgments given by itself, but in so far only as relates to execution under this section;
- (c) the reasonable costs of and incidental to the registration of the judgment (including the costs of obtaining a certified copy thereof from the original court and of the application for registration) shall be recoverable in like manner as if they were sums payable under the judgment.

(4) Rules of court shall provide—

- (a) for service on the judgment debtor of notice of the registration of a judgment under this section; and
- (b) for enabling the registering court on an application by the judgment debtor to set aside the registration of a judgment under this section on such terms as the court thinks fit; and
- (c) for suspending the execution of a judgment registered under this section until the expiration of the period during which the judgment debtor may apply to have the registration set aside.

(5) In any action brought in any court in the United Kingdom on any judgment which might be ordered to be registered under this

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Issue of certificates of judgments in the United Kingdom.

Power to make rules.

Interpretation.

section, the plaintiff shall not be entitled to recover any costs of the action unless an application to register the judgment under this section has previously been refused, or unless the court otherwise orders.

10. Where a judgment has been obtained in the High Court in England or Ireland, or in the Court of Session in Scotland, against any person, the court shall, on an application made by the judgment creditor and on proof that the judgment debtor is resident in some part of His Majesty's dominions outside the United Kingdom to which this Part of this Act extends, issue to the judgment creditor a certified copy of the judgment.

11. Provision may be made by rules of court for regulating the practice and procedure, (including scales of fees and evidence), in respect of proceedings of any kind under this Part of this Act.

12.—(1) In this Part of this Act, unless the context otherwise requires—

The expression "judgment" means any judgment or order given or made by a court in any civil proceedings, whether before or after the passing of this Act, whereby any sum of money is made payable, and includes an award in proceedings on an arbitration if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place:

The expression "original court" in relation to any judgment means the court by which the judgment was given:

The expression "registering court" in relation to any judgment means the court by which the judgment was registered:

The expression "judgment creditor" means the person by whom the judgment was obtained, and includes the successors and assigns of that person:

The expression "judgment debtor" means the person against whom the judgment was given, and includes any person against whom the judgment is enforceable in the place where it was given.

(2) Subject to rules of court, any of the powers conferred by this Part of this Act on any court may be exercised by a judge of the court.

Power to apply Part II. of Act to territories under His Majesty's protection.

13. His Majesty may by Order in Council declare that this Part of this Act shall apply to any territory which is under His Majesty's protection, or in respect of which a mandate is being exercised by the Government of any part of His Majesty's dominions, as if that territory were part of His Majesty's dominions, and on the making of any such Order this Part of this Act shall, subject to the provisions of the Order, have effect accordingly.

Extent of Act.

14.—(1) Where His Majesty is satisfied that reciprocal provisions have been made by the legislature of any part of His Majesty's dominions outside the United Kingdom for the enforcement within that part of His dominions of judgments obtained in the High Court in England, the Court of Session in Scotland, and the High Court in Ireland, His Majesty may by Order in Council declare that this Part of this Act shall extend to that part of His dominions, and on any such Order being made this Part of this Act shall extend accordingly.

(2) An Order in Council under this section may be varied or revoked by a subsequent Order.

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MISCELLANEOUS.

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15. Where, for the purpose of disposing of any action or other matter which is being tried by a judge with a jury in any court in England or Wales, it is necessary to ascertain the law of any other country which is applicable to the facts of the case, any question as to the effect of the evidence given with respect to that law shall, instead of being submitted to the jury, be decided by the judge alone.

Questions of foreign law to be decided by judge.

16.—(1) Where a submission to arbitration provides that the reference shall be to three arbitrators, one to be appointed by each party and the third to be appointed by the two appointed by the parties, then, unless the submission expresses a contrary intention—

Power as to appointment of arbitrators where submission provides for three arbitrators.

(a) If one party fails to appoint an arbitrator for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and the award of the arbitrator so appointed shall be binding on both parties as if he had been appointed by consent:

(b) If after each party has appointed an arbitrator the two arbitrators appointed fail to appoint a third arbitrator within seven clear days after the service by either party of a notice upon them to make the appointment, the court or a judge may, on an application by the party who gave the notice, exercise in the place of the two arbitrators the power of appointing the third arbitrator:

(c) If an arbitrator, appointed either by one of the parties, by the two arbitrators, or by the court or a judge, refuses to act, or is incapable of acting, or dies, a new arbitrator may be appointed in his place by the party, arbitrators, or court or judge, as the case may be.

(2) The court or a judge may set aside any appointment of a person to act as sole arbitrator made in pursuance of this section.

(3) This section shall be construed as if it were included in the Arbitration Act, 1839, and that Act shall have effect accordingly.

52 & 53 Vict. c. 49.

17.—(1) Where a corporation, being a corporation to which this section applies, is named as the executor of the will of a deceased person who at the time of his death was domiciled in England, probate of the will may be granted by the High Court to that corporation by its corporate name, and a corporation to which probate is granted in pursuance of this section shall, subject to the provisions of any rules made for giving effect to this section, have the same rights and be subject to the same liabilities and duties in all respects as an individual to whom probate is granted.

Power to grant probate to corporations.

(2) Rules may be made under section thirty of the Court of Probate Act, 1857, for giving effect to this section, and in particular for modifying in their application to a corporation any enactments relating to executors and for prescribing the person who is to act on behalf of a corporation for the purpose of any oath required to be taken, or any other thing required to be done, by an executor on an application for or otherwise in connection with a grant of probate.

20 & 21 Vict. c. 77.

(3) The corporations to which this section applies are all corporations having their principal place of business in the United Kingdom.

APPENDIX (B).

Arbitration Clauses (Protocol) Act, 1924.

14 & 15 GEO. 5, c. 39.

An Act to give effect to a Protocol on arbitration clauses signed on behalf of His Majesty at a meeting of the Assembly of the League of Nations held on the twenty-fourth day of September, nineteen hundred and twenty-three.

[7th August, 1924.]

Whereas at a meeting of the Assembly of the League of Nations held on the twenty-fourth day of September, nineteen hundred and twenty-three, the protocol on arbitration clauses set forth in the Schedule to this Act was signed on behalf of His Majesty:

And whereas for the purpose of giving effect to the said protocol it is expedient that the provisions hereinafter contained shall have effect:

BE IT THEREFORE ENACTED, etc., as follows:—

Staying of
court pro-
ceedings in
respect of
matters to
be referred
to arbitra-
tion under
commercial
agreements.

1.—(1) Notwithstanding anything in the Arbitration Act, 1889, if any party to a submission made in pursuance of an agreement to which the said protocol applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, unless satisfied that the agreement or arbitration has become inoperative or cannot proceed, shall make an order staying the proceedings.

Scotland and
Northern
Ireland.

(2) This section in its application to Scotland and Northern Ireland shall have effect as if the reference to the Arbitration Act, 1889, were omitted therefrom, and in the application of this section to Scotland references to staying proceedings shall be construed as references to sisting proceedings.

Short title.

2. This Act may be cited as the Arbitration Clauses (Protocol) Act, 1924.

SCHEDULE.

PROTOCOL ON ARBITRATION CLAUSES.

The undersigned, being duly authorised, declare that they accept, on behalf of the countries which they represent, the following provisions:—

1. Each of the Contracting States recognises the validity of an agreement whether relating to existing or future differences between parties, subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.

Each Contracting State reserves the right to limit the obligation mentioned above to contracts which are considered as commercial under its national law. Any Contracting State which avails itself of this right will notify the Secretary-General of the League of Nations, in order that the other Contracting States may be so informed.

2. The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.

The Contracting States agree to facilitate all steps in the procedure which require to be taken in their own territories, in accordance with the provisions of their law governing arbitral procedure applicable to existing differences.

3. Each Contracting State undertakes to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory under the preceding articles.

4. The tribunals of the Contracting Parties, on being seized of a dispute regarding a contract made between persons to whom Article 1 applies and including an arbitration agreement whether referring to present or future differences which is valid in virtue of the said article and capable of being carried into effect, shall refer the parties on the application of either of them to the decision of the arbitrators.

Such reference shall not prejudice the competence of the judicial tribunals in case the agreement or the arbitration cannot proceed or become inoperative.

5. The present Protocol, which shall remain open for signature by all States, shall be ratified. The ratifications shall be deposited as soon as possible with the Secretary-General of the League of Nations, who shall notify such deposit to all the signatory States.

6. The present Protocol shall come into force as soon as two ratifications have been deposited. Thereafter it will take effect, in the case of each Contracting State, one month after the notification by the Secretary-General of the deposit of its ratification.

7. The present Protocol may be denounced by any Contracting State on giving one year's notice. Denunciation shall be effected by a notification addressed to the Secretary-General of the League, who will immediately transmit copies of such notification to all the other signatory States and inform them of the date of which it was received. The denunciation shall take effect one year after the date on which it was notified to the Secretary-General, and shall operate only in respect of the notifying State.

8. The Contracting States may declare that their acceptance of the present Protocol does not include any or all of the under-mentioned territories; that is to say, their colonies, overseas possessions or territories, protectorates or the territories over which they exercise a mandate.

The said States may subsequently adhere separately on behalf of any territory thus excluded. The Secretary-General of the League of Nations shall be informed as soon as possible of such adhesions. He shall notify such adhesions to all signatory States. They will take effect one month after the notification by the Secretary-General to all signatory States.

The Contracting States may also denounce the Protocol separately on behalf of any of the territories referred to above. Article 7 applies to such denunciation.

Part V.—MISCELLANEOUS.

CHAPTER XII.

ANGLO-INDIAN, ANGLO-EGYPTIAN, ETC., DOMICIL :
RATE OF EXCHANGE : RUSSIAN BANK CASES.

PART V.

CAP. XII.

(i) The anomalous and exceptional nature of Anglo-Indian domicile has already been referred to (p. 87). A series of decisions, beginning in 1790 with *Bruce v. Bruce*, 2 B. & P. 229 and ending in 1865 with *Jopp v. Wood*, 4 De. G. J. & S. 623, decided that an officer in the service of the East India Company was domiciled in India (a). These cases, said Lindley, L.J., in *Ex parte Cunningham*; *In re Mitchell*, (1884), 13 Q. B. D., at p. 425, "were anomalous and exceptional, and the theory of them not very clear. I think it was correctly explained by Turner, L.J., in *Jopp v. Wood*, where he said : 'At the time when those cases were decided the Government of the East India Company was in a great degree, if not wholly, a separate and independent Government, foreign to the Government of this country; and it may well have been thought that persons who had contracted obligations with such a Government for service abroad could not reasonably be considered to have intended to retain their domicile here. They in fact became as much estranged from this country as if they had become servants of a foreign Government.' Looking at what the Lord Justice there says, and at what Wood, V.-C., said in *Forbes v. Forbes* (1854), Kay, 341, it may well be that the fact of residence in the East Indies may have introduced an anomaly into the law of domicile. While they were law those cases very much confused the English law of domicile, and they were always anomalous cases."

Originally, no doubt, the Company's servants, for the most part, intended to make India their permanent home, but this has now for many years ceased to be so. With the abolition of the East India Company the operation of these cases has ceased. They have been held to have been on principle wrongly decided, since all servants of the Company did not intend to make India their permanent home. The *animus manendi* had become a mere assumption. Such a domicile had therefore become anomalous,

(a) Dicey & Keith, Conflict of Laws (1922), p. 796.

and, as Dicey asserts, it no longer exists. By the India Act, 1858 (21 & 22 Vict. c. 106), the powers of the East India Company and its servants were transferred to the Crown, and by s. 10 of the Succession Act of the India Council, 1865, "a man is not to be considered as having taken up his fixed habitation in British India merely by reason of his residing there in Her Majesty's civil or military service or in the exercise of any profession or calling." In *Wauchoppe v. Wauchoppe* (1877), 4 R. 945, Samuel Wauchoppe, whose nationality and domicile of origin was Scottish, entered the service of the East India Company in 1841 and went to British India, dying in Europe while home on furlough in 1875. It was held by the Court of Session that he had acquired an Anglo-Indian domicile, and that neither the Act of 1858 nor the Act of 1865 affected such domicile, which was his at the time of his death. In *Keyes v. Keyes and Gray*, [1921] P. 204, the husband petitioner, who during his military service in India had married the respondent, and after residing with her for two years there had obtained a decree of divorce from the High Court of the Punjab at Lahore, was found not to be domiciled in India. Consequently, the Indian Courts only possessing jurisdiction over persons domiciled in India, Duke, P., held the decree of the Indian Court under the Indian Divorce Act, 1869, to be invalid.

In *Casdagli v. Casdagli*, [1919] A. C. 145, the question for decision was whether any rule of law existed preventing a registered British subject from acquiring a domicile in Egypt by reason of the extraterritorial jurisdiction exercised by Great Britain in that country. Hitherto the presumption had prevailed against the intention of British Christian subjects voluntarily becoming domiciled in non-Christian States. This view was expressed by Dr. Lushington in 1844 in *Maltass v. Maltass*, 1 Rob. Ecc. 67, although he was careful to point out that the same reasoning did not apply to non-Christian British subjects, as Lord Stowell in *The Indian Chief* (1800), 3 C. Rob. 22, applied in cases of a total and entire difference of religion, customs and habits. In *In re Tootal's Trusts* (1882), 23 Ch. D. 532, where an Anglo-Chinese domicile was claimed, Chitty, J., said: "The difference between the religion, laws, manners, and customs of the Chinese and of Englishmen is so great as to raise every presumption against such a domicile." In reviewing these cases in his judgment in *Casdagli's Case*, Lord Finlay, L.C., said that the expression Anglo-Chinese domicile appeared to him apt to denote compendiously a domicile in China acquired by a British subject, and carrying with it the privileges conferred by treaty upon British residing there. Mr. Justice Chitty's decision, however, was not

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binding on the House of Lords, and it was in Lord Finlay's opinion erroneous. He agreed with the decision of the Judicial Committee in *Abd-ul-Messih v. Farra* (1887), 13 App. Cas. 431, that the deceased was not a British subject, but dissented from some of the *dicta* of Lord Watson in that case. The real political position in Egypt was not correctly stated to the Committee. *In re Tootal's Trusts* had been much questioned. In *The Emmæus* (1915), 1 B. & C. P. C. 605, Evans, P., doubted it, and said it had recently been dissented from by the Supreme Judicial Court of Maine in *Mather v. Cunningham* (1909), 105 Maine, 326. The deceased had made his home and carried on his business at Shanghai, his domicile of origin being in Waldo County, Maine. The question for decision was whether an American can, as a matter of law, acquire a domicile in the province of Shanghai, where by treaty American law is substituted for the Chinese local laws. After an elaborate examination of the decision in *In re Tootal's Trusts*, the Supreme Court found that he can. The deceased had abandoned his domicile of origin and had acquired a domicile of choice in Shanghai, and consequently the Probate Court of Maine had no jurisdiction of his estate. In this enlightened age, it was declared the doctrine of immiscibility cannot be accorded such weight as to establish a legal presumption against all the other evidence tending to prove *animus*. Since the *dictum* of immiscibility was first declared, the world has experienced a revolution touching the national, commercial and trade relations between the nations of the East and those of the West.

In agreeing with Lord Finlay, Lord Haldane said that all that *In re Tootal's Trusts* and *Abd-ul-Messih v. Farra* "decided was that mere membership of a protected British society in a foreign country is not enough to establish a domicile which would attract the British municipal law governing succession, unless it was accompanied by other essentials required in order to establish a British domicile. These essentials comprise settlement in a home on territory that is actually British, along with intention to make that home permanent. It is said to be difficult to find an adequate definition of domicile, and no doubt it is difficult. The reason is to be looked for in the older decisions in which the fundamental principle has been obscured by qualifications made in the earlier cases, in order to provide for residence occasioned by considerations of health, or the anomalous conditions of service in India under the East India Company. Some obscurity existed at one time as to whether a change of allegiance was not also required in order to establish the acquisition of a new domicile, an obscurity which has now been removed. The effort to recon-

cile expressions used in numerous cases decided in these connections—cases which have never been overruled in terms—has embarrassed those who have attempted to find words which would cover everything of apparent authority which appears in the books. But it is clear to-day that there is no reason for hesitating to hold that a man who has shaken the dust of England from off his shoes, and has gone to reside in a civilised foreign country with the intention of making a new and permanent home there, gets rid of his English domicile of origin. Of course, the conditions of that foreign country may be so barbarous as to make it so unlikely that he should have intended to make it his home, in the full sense of accepting its institutions as his own, that he may not have the intention to do so imputed to him. That happened in *In re Tootal's Trusts*.”

The other Law Lords, Dunedin, Atkinson and Phillimore, delivered elaborate concurring judgments. It was held that there was no rule of law preventing a British subject resident in Egypt, registered as a British subject at the British Consulate, from acquiring an Egyptian domicile; that the husband had acquired an Egyptian domicile and so lost his English domicile; and that consequently the English Court had no jurisdiction to entertain a suit by his wife for dissolution of their marriage.

In his fifth and earlier editions, Westlake had come to the same conclusions as those reached by the House of Lords in this case upon the decisions in *In re Tootal's Trusts* and *Abd-ul-Messih v. Farra*. Dr. Huberich also took the same view in 24 Law Quart. Rev. (1908), p. 440. After citing *In re Allen's Will* (1907), U. S. Court for China, Shanghai Term, 1907, pamphlet, where it was held that Dr. Allen, whose domicile of origin was the State of Georgia, had acquired a domicile in China, and the English decisions, Dr. Huberich came to the conclusion that “where the requisite *factum* and *animus* are shown to exist, there is no valid reason why an Englishman or an American should not be held to acquire a domicile in China.”

But, as Mr. Bentwich points out, the question still remains “Whether a British subject who obtains a domicile of choice in an Eastern country, in which extra-territorial jurisdiction is exercised, should have his personal rights determined in such jurisdiction by English law or by the law of his domicile of origin, to which, according to its general principles, English law would defer. In other words, does the reference to the law of England in the Capitulations which are sanctioned by the territorial law as governing the personal rights imply the internal English law, or by a species of *renvoi* does it embrace the law of any part of the British Empire by which an English Court, judging the case

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in England, would decide the matter?" Mr. Bentwich submits that the reference to the English law should be understood in the wider sense, so that, for instance, if a Scotsman or a Hindu, being British subjects, were found to be domiciled in an Eastern country, the Consular Court, seised of the succession, should apply not the English internal law of succession, but the Scots or Hindu law (b).

As Lord Watson said in *Abd-ul-Messih v. Farra*, Anglo-Indian domicile "is altogether independent of political status; it arises from residence in India and has always been held to carry with it the territorial law of that country, whether under the empire of the Queen or under the previous rule of the East India Company, which the Courts of England treated (in questions of domicile) as an independent Government. By the law established in India, the members of certain castes and creeds are, in many important respects, governed by their own peculiar rules and customs, so that an Indian domicile of succession may involve the application of Hindu or Mohammedan law; but those rules and customs are an integral part of the municipal law administered by the territorial tribunals. The legal condition of foreigners resident in Turkey, who are exempted by treaty from the jurisdiction of its local Courts, is very well described by Ferand Giraud (*Jurisdiction française*, vol. ii., p. 58). They form, according to the view of that learned writer, an anomalous extra-territorial colony of persons of different nationalities, having unity in relation to the Turkish Government but devoid of such unity when examined by itself; the consequence being that its members continue to possess their nationality and their civil and political rights, just as if they had never ceased to have their residence and domicile in their own country."

(ii) The rule formerly was that, in arriving at the proper equivalent in British currency for the purpose of assessing damages or debts, the rate of exchange should be that current at the time the judgment is recovered. The general principle was expressed by Lord Eldon in *Cash v. Kennion* (1804), 11 Ves. 314, where he said: "I cannot bring myself to doubt, that where a man agrees to pay £100 in London upon the 1st January he ought to have that sum there upon that day. If he fails in that contract, wherever the creditor sues him, the law of that country ought to give him just as much as he would have had if the contract had been performed." This principle was adopted in *Scott v. Bevan*, 2 B. & Ad. 78, and approved by Lindley, M.R., in *Manners v. Pearson*, [1898] 1 Ch. 581, where he said:

(b) Westlake (1922), p. 326.

“If the defendants were within the jurisdiction of any other civilised State and were sued there, as they might be, the Courts of that State would have to deal with precisely the same problem and to express in the currency of that State the amount payable by the defendants instead of expressing it in Mexican dollars. If this be the true explanation of the necessity for expressing in English money what the defendants ought to pay, it follows that such necessity does not arise until the Court orders payment. But it does not follow that the sum to be inserted in the order is the equivalent at that time of the moneys payable by the terms of the contract, for the defendants may be liable not only to pay those sums, but also damages in the shape of interest or otherwise for not having paid them at the proper time. The obligations, if any, of the defendants in this respect must be determined before the amount for which they are liable can be calculated and expressed in any judgment or order for payment.” From this judgment Vaughan Williams dissented. After referring to *Scott v. Bevan* he said: “It seems plain that this mode of computing the value of foreign currency in English sterling, and thus converting the one currency into the other, is based upon damages for the breach of contract to deliver the commodity bargained for at the appointed time and place, and if that is so, it follows that the date as at which that value must be ascertained is the date of the breach and not the date of the judgment.”

The old rule has, however, been rejected in a number of cases heard since the conclusion of Peace. In *Di Ferdinando v. Simon, Smits & Co., Ltd.*, [1920] 3 K. B. 409, where the defendants contracted to carry goods for the plaintiff from England to Milan and deliver them there on 10th February, 1919, but in breach of their contract failed to do so and converted the goods, it was held by Roche, J., that the date of the breach, viz., 10th February, was the date on which the rate of exchange should be calculated, and he assessed the damages as on that date by ascertaining the value of the goods to the plaintiff in Milan at that time. In Italian money this was 48,000 lire, equivalent at that date to £1,555. At the date of the trial on 30th March, 1920, the rate of exchange had so altered that the equivalent was only £780. Roche, J., gave judgment for £1,555. In affirming this decision, Bankes, L.J., said: “It seems to me that the difficulty to a large extent disappears if one concentrates one’s attention on the rule of law which has to be applied. The plaintiff is entitled to have his damages assessed as at the date of the breach, and the Court has only jurisdiction to award damages in English money. The Judge

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must therefore express those damages in English money, and in order to do so he must take the rate of exchange prevailing at the date of the breach."

The learned Judge claimed that *Scott v. Bevan and Manners v. Pearson* supported this view, and cited with approval the dissenting judgment of Vaughan Williams, L.J., and the views of Bailhache, J., in *Barry v. Van den Hurk*, [1920] 2 K. B. 709, and of McCardie, J., in *Lebeaupin v. Crispin*, [1920] 2 K. B. 714. In agreeing, Scrutton, L.J., said: "Just as the Court has to exclude from the calculation of the damages the subsequent change in the value of the goods after the date of breach, so also it has to exclude the subsequent change in the value of the currency after the date of the breach; and for the same reason—namely, that the changes in the value of the currency are too remote a consequence of the breach to be taken into consideration by the Court." When there is no agreement to pay interest and there is no statute giving a right to interest, interest may yet be awarded by way of damages, but he had been unable to find that interest by way of damages had ever been allowed to cover alteration in the exchange, and for the same reason—such damages being too remote (c).

This decision was followed by the House of Lords in *S.S. Celia v. S.S. Volturno*, [1921] 2 A. C. 544. In this case both vessels were held to blame for a collision, and the cross-claims for damages were agreed between the parties. Those of the *Volturno* included one for loss due to the fact that the vessel was under hire to the Italian Ministry of Marine at all material dates, and that, in consequence of her detention for repairs, deductions from her hire were made amounting to 304,418 lire. The question for decision was at what date ought the rate of exchange to be fixed in order that those damages, which were originally fixed in lire, should be converted into sterling:—*Held*, by Lords Buckmaster, Sumner, Parmoor and Wrenbury, Lord Carson dissenting, that the proper date for ascertaining the rate of exchange for the purpose of converting the amount payable into English currency was the date at which the detention occurred. Lord Carson declared that the dissenting judgment of Vaughan Williams could not be reconciled with that of the majority, and that "the true rule ought to be that the foreigner should, when the damages as assessed or agreed upon are in foreign currency, receive under the judgment neither more nor less than that sum, and that the proper date to ascertain this is

(c) See also *Société des Hôtels du Touquet-Paris-Plage v. Cumming*, [1921] 3 K. B. 459, and *In re British-American Continental Bank, Ltd., Crédit Général Liégeois' Claim*, [1922] 2 Ch. 589.

when the entry of judgment is being made for the purpose of making the judgment available.”

And where a winding-up order had been made after the breach of the contract, P. O. Lawrence, J., in *In re British-American Continental Bank, Ltd.; Lisser and Rosenkrantz's Claim*, [1923] 1 Ch. 276, held that the rate of exchange at which the conversion is to be made is not the rate ruling at the date of the winding up, but that at the date of breach, and that the creditors were not bound to accept a tender made by the liquidator of the sum of German marks in full satisfaction of their claim, as the marks there tendered did not represent the full amount of the damages for which the creditors, in accordance with the above principle, are entitled to be admitted as creditors in the winding up.

In *British Bank for Foreign Trade, Ltd. v. Russian Commercial and Industrial Bank* (1921), 38 T. L. R. 65, the plaintiffs, a British bank, obtained from the defendants, a Russian bank, on the security of certain bonds, which were deposited in Belgium, a loan of 750,000 Russian roubles in June, 1914, when the currency was based on the gold rouble. After the war broke out, the right to exchange the paper rouble for gold was suspended, and inflation took place, with the result that ultimately paper roubles became worthless. For a time Imperial, Kerensky and Soviet roubles were equally valid for all purposes, but at the time of the hearing such currency as existed in Russia was Soviet paper, the Imperial and Kerensky roubles being required by the Bolshevik Government for export abroad. In those circumstances, the plaintiffs sought to redeem their securities by repayment in paper roubles. In an action in the King's Bench Division, they asked for a declaration that they were entitled to the possession of their securities upon payment of 750,000 roubles. Roche, J., decided, however, that the loan was a sterling loan, and not a rouble loan, but his decision was reversed by the Court of Appeal and on appeal by the House of Lords (37 T. L. R. 919). The plaintiffs then proceeded with the present action for redemption in the Chancery Division. In holding that the loan was repayable in paper roubles issued by the authority of the Russian Government and in use at the material date, and that, upon payment of the principal and interest in roubles and of the costs in English money, the plaintiffs were entitled to redeem, Russell, J., pointed out that the same causes which caused the depreciation of the rouble had also depreciated the plaintiffs' securities. It had been argued that, if the debt was to be paid outside Russia, it must be paid in gold roubles, because paper money was only legal tender in

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Russia, and not outside. He did not agree with that view. The mortgagor was suing to recover his securities, and was entitled to do so if he fulfilled his legal contract. If he made payment in full in the kind of money actually advanced to him—paper roubles issued by authority of the Russian Government—it did not matter whether that paper money was legal tender in or out of Russia. Even if it were true that by Russian law the defendants could not grant a loan for more than nine months, the plaintiffs could not have been called upon to repay except in exchange for their securities, which, being in Belgium, could not be forthcoming. The decision in *The Volturno* as to the date when the rate of exchange was to be taken did not apply. The defendants said the plaintiffs must act equitably, but he knew of no authority that, because the mortgage contract from unexpected causes was alleged to operate harshly on the mortgagee, the Court could refuse redemption or vary the terms on which it would be granted. He was not entitled from motives of sympathy or otherwise to decree redemption otherwise than in accordance with the strict rights of the parties. In a case of a stock mortgage, the mortgagee was bound to replace the original amount of stock, without regard to fluctuations in value, and in his opinion, in the case of a loan of paper roubles, the risk of depreciation or benefit of appreciation lay with the lender. The defendants were seeking to throw the risk of fluctuation upon the mortgagors, and, if he acceded to their suggestion, he would in effect be changing the loan from a paper rouble loan to a sterling loan.

This case was followed by Russell, J., himself, and by the Court of Appeal in *In re Chesterman's Trusts; Mott v. Browning*, [1923] 2 Ch. 466, which was an action to administer trust funds upon the death of the tenant for life on 19th January, 1920. Two German beneficiaries had encumbered their shares, which were mortgaged to a Dutch bank to secure the repayment in German reichsmarks. At the date of the execution of the mortgages, the creditors could, under German law, have insisted upon payment in gold, but by an Imperial statute of 4th August, 1914, it was provided that Imperial Treasury notes should be legal tender, and that any prior agreements for payment in gold should not be binding on debtors. It was held that the loans were loans of foreign money, involving on the one side an obligation to pay and on the other to accept payment in whatever at the date of repayment was legal tender and legal currency in the foreign country whose money was lent, and that the covenants to pay specified sums in reichsmarks were satisfied under the German law now in force by the payment in Treasury

notes of sums so specified. It was further held, Younger, L.J., dissenting, that the date for the conversion of the sums found due in marks into English currency was the date of the master's certificate. Lord Justice Younger, on the contrary, held that the date of conversion was the 19th January, 1920, the date of the death of the tenant for life: "In each case the sum in marks due for principal and interest as at that date would be calculated and translated into sterling as at the exchange of that day, and each subsequent instalment of interest down to the date of payment would in like manner be converted into sterling at the rate of exchange ruling at the date when such payment became due." Where, said the Lord Justice, a defendant's obligations, whether in respect of tort, breach of contract, or debt, are expressible in terms of British currency, our Courts have no regard, in assessing the amount recoverable, to any variation in the purchasing power of the sovereign between, for example, the date of the breach and the date of the judgment. "One might have thought that in relation to a commodity of such limited utility as foreign currency the Courts here might for translation purposes have been equally oblivious to any fluctuation in its internal exchangeable value, and might have proclaimed in all these cases its sole purpose to be to give to the plaintiff the nearest possible equivalent in English sterling for that amount of foreign currency to which at that moment it held him entitled, and not to give him a sum in English currency which in these days of violent fluctuations in external values of foreign currency would probably be very much more, might be less, but could only by accident be an equivalent of that amount. And this appears to be the American view. But it is not the law of this country. It has now been definitely decided that, certainly in cases both of damages for breach of contract and of damages for tort, the translation must be effected on at the date of the breach or of the wrong."

Was, he asked, this obligation to pay in foreign currency a debt at all. Was it technically more than an obligation to deliver particular quantities of a prescribed commodity at prescribed dates, and was failure to deliver more than a breach of contract to deliver, as in *In re British-American Continental Bank; Lisser and Rosenkrantz's Claim*, [1923] 1 Ch. 276.

Upon the first point, viz., what constitutes legal tender, these decisions are in line with the American Legal Tender Cases, *Knox v. Lee*, *Parker v. Davis* (1870), 12 Wall. 457. Here paper currency, known as "greenbacks," had been made legal tender in payment of all pre-existing debts and of all debts contracted after their passage by various Acts of Congress.

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(iii) The extraterritorial effect of municipal legislation has once more been considered in several recent cases. Before examining these it is desirable to refer to the leading case of *Rey v. Lecouturier*, [1908] 2 Ch. 715; [1910] A. C. 262, the facts of which are shortly as follows :

Prior to 1901 the headquarters of the Order of Carthusian monks was the Grand Chartreuse, near Grenoble, where for many years they had carried on the business of manufacturing by a secret process and of selling a liqueur known as "Chartreuse." In 1876 they registered in England as a trade mark a label containing the words "Liqueur fabriquée à la Grand Chartreuse." In 1901 a statute, the Law of Associations, was passed in France, and as interpreted by the Courts the property of the monks, including their trade marks, passed to a liquidator, Lecouturier, and became vested in him. In 1897 the trade marks in England and France were assigned by the then procureur of the order to the new procureur, Rey, and in 1898 Rey was registered in England as the proprietor of the trade marks, and his name remained on the register till 1904, when, in consequence of the events which had happened in France, the name of Lecouturier was substituted. After their expulsion from France by the Law of Associations, the headquarters of the Order were transferred to Lucca and the manufacture of the liqueur to Tarragona, in Spain, where the secret process, which had been retained, was carried on. The liqueurs so made bore the insignia of the Carthusian Order and the old trade marks and labels, the only difference being a note to the effect that the liqueurs were now made at Tarragona. In the meantime the liquidator and his assignees had continued to manufacture a liqueur at the Grand Chartreuse, but not by the secret process, of which they were ignorant, which they called Chartreuse, using bottles of the old shape and bearing the old labels used by the monks. It was held by the Court of Appeal, reversing Joyce, J., that the word "Chartreuse" had acquired in England the secondary meaning of a liqueur made by the monks of the Grand Chartreuse; that under the French judgments the liquidator had not acquired the right of selling their own liqueur in England under the original labels and marks; that the English trade marks had not passed to the liquidator; that the liquidator and his assignees were passing off their own liqueur under the name of "Chartreuse" and consequently the plaintiffs were entitled to an injunction restraining them from using the word Chartreuse in England.

This judgment was affirmed by the House of Lords. "The only plausible ground of appeal urged at the Bar," said Lord

Macnaghten, "was that under French law and by reason of their purchase from the liquidator the appellants were justified in doing what they have done. To me it seems perfectly plain that it must be beyond the power of any foreign Court or any foreign legislature to prevent the monks from availing themselves in England of the benefit of the reputation which the liqueurs of their manufacture have acquired here or to extend or communicate the benefit of that manufacture to any rival or competitor in the English market. But it is certainly satisfactory to learn from the evidence of experts in French law that the Law of Associations is a penal law—a law of police and order—and is not considered to have any extraterritorial effect."

In concurring, Lord Shaw referred to the "comity of nations" as an expression which is familiar but necessarily indefinite. The attempts to fix it down into a set of rules of legal or binding effect had been very fruitless, but he took it at least that comity tends towards encouraging the co-operation of civilised communities by giving effect, so far as may be, to the regulation by the legislatures and Courts of the domicile of the parties of the relations and rights of these parties. Such regulations should upon all suitable occasions be treated with most favourable regard and with the desire to respect and apply the principles from which, so to speak, the central propositions emanate, so far as these can be accommodated to the practice and requirements of foreign judicatures.

In the French legislation and decisions in question he could trace nothing either express or implied which suggested extra-territorial operation nor any intention express or implied to effect the transfer or affect the holding of property in other countries. He saw nothing conferring upon the liquidator a right to strip the Carthusian Order of their possessions in all parts of the world.

In agreeing, Lord Loreburn pointed out that this property, for property it was, was property situate in England and was therefore to be regulated and disposed of in accordance with the law of England, although happily the decision of the House was not inconsistent with the decisions of the French Courts.

This decision amounts to this. British Courts will give effect to foreign legislation and to foreign judgments so far as their operation is confined to property situate or transactions carried out in such foreign countries, but that they will not give effect to them when they purport to control property situate in or transactions to be carried into effect in England. In other words they will not recognise the extraterritorial operation of foreign legislation.

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In the Russian Bank Cases, *The Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse*, [1923] 2 K. B. 630, and *Banque Internationale de Commerce de Petrograd v. Goukassow*, *ibid*, 682, it was held by the Court of Appeal in the former that (1) in consequence of the decrees and orders of the Russian Soviet Government dated 14th December, 1917, and 26th January and 12th April, 1918, the Russian Bank had ceased to exist and that with its extinction the authority of the manager of its London branch to bring an action in the Bank's name had lapsed; (2) that the defendants were not precluded by estoppel or otherwise from relying on this absence of authority as a defence to the action. *Daimler Co. v. Continental Tyre Co.*, [1916] 2 A. C. 307, was followed. *Richmond v. Branson*, [1914] 1 Ch. 968, was distinguished. From this decision Atkin, J., dissented upon the ground that on the evidence the Bank still existed. To determine whether the bonds in question belonged to the Soviet Government, it would be necessary to consider how far the Soviet legislation has extraterritorial operation in respect of movables. It was unnecessary to consider this question.

"The all-important question," said Bankes, L.J., "as it appears to me, is whether or not the true effect of the Soviet legislation has been to destroy the Russian and Commercial Bank as an entity or juridical person; because if it did, nothing that Mr. Jones (its manager) said or did in this country could have preserved the existence of a branch in this country of a Russian Bank which had ceased to have any legal existence."

"Confiscatory legislation," he concluded, "such as that of the Soviet Government must necessarily lead to difficulties and hardships, and I cannot see any sufficient justification for attempting to construe that legislation so as to minimize the difficulties or reduce the hardships."

"Whether a Russian company is dissolved," said Scrutton, L.J., "depends on Russian law, the law of the country of its formation, not on English law, whose Courts and law cannot create or dissolve a Russian legal entity."

Upon the proceedings in the English winding up, his Lordship thought there was some doubt whether the English Court was not dealing adversely with the property of a foreign sovereign State, a proceeding which appear to be beyond their jurisdiction. "A Russian company is an entity depending on Russian law, which cannot be dissolved by an English Court and whose shareholders depend for their existence on Russian law only. While, if a foreign company carries on business within the English jurisdiction, an English Court can deal with its business assets

and creditors within the jurisdiction, I do not know that their powers over and duties to shareholders, creditors and assets without the jurisdiction have ever been satisfactorily considered, and I say no more than that some of the orders reported to us in this case seem to require careful consideration. It is not necessary to decide anything in this case, but nothing in my judgment must be taken as approving the validity of the present winding-up orders and proceedings.”

In the second case, *Banque Internationale de Commerce de Petrograd v. Goukassow*, the Court was unanimous in holding that the bank was dissolved by the Soviet decrees. Atkin, L.J., felt himself bound by the previous decision, but alluded to the fantastic and deplorable effect of the decision. The decision in *Rey v. Lecouturier* was much pressed on the Court, and in reference to it Scrutton, L.J., said he had considered that case and the suggestion that this is a penal law, which the English Courts will not recognise. “In that case the Order of the Carthusian Monks existed all over Europe and was dissolved only in France, and the individual members of the Order by name were protecting their English trade marks and their English trade reputation; they were allowed to do so, and I can understand the view that *French legislation could not touch English property or personal rights*. But where the penal law has killed the person, I do not see how external Courts which recognise the law can help recognising the death . . . I quite appreciate that this judgment may involve difficult questions as to the ownership of property belonging to the deceased corporation.”

Upon appeal to the House of Lords both these decisions were reversed upon the ground that the defendants had not proved that the banks had been dissolved by the Soviet decrees. In the first case the plaintiffs were held to be entitled to the return of the bonds.

The substance of these cases is simply this, that if a company is dissolved by the legislation of that State in accordance with its own law, such company must be regarded everywhere as having become legally extinct with all its branches, and consequently it can no longer sue. But these cases do not purport to invalidate the decision of the House of Lords in *Rey v. Lecouturier*. It is good international law that a title to property legally acquired anywhere will be protected everywhere. Accordingly even if property is confiscated by legislation and legally vested in another, the Courts here are bound to protect the latter if his title is contested here, notwithstanding, as Scrutton, L.J., said in the case of *The Company for Mechanical Wood Working, A. M. Luther v. Sagor & Co.*, [1921] 1 K. B.

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456; 3 K. B. 532, that such legislation is "contrary to essential principles of justice and morality." But it is quite another matter where British Courts are invited to give effect to foreign confiscatory legislation affecting property and personal rights situate in Great Britain.

As suggested by Atkin, L.J., the property of the companies which have been dissolved in Russia, situate in this country, may be held to be *bona vacantia* and to vest in the Crown. An illustration of this is found in *Re Barnett's Trusts*, [1902] 1 Ch. 847, where a bastard of Austrian nationality, entitled to a fund in Court here, died intestate and without heirs in Vienna. By Austrian law the Austrian State was entitled to the fund under Art. 760 of the Austrian Civil Code. It was contended that the maxim *Mobilia sequuntur personam* applied. This contention was rejected by Kekewich, J., who held that as the right claimed by the Austrian Finance Minister was not in the nature of a succession, since he was not the legal personal representative and there was no succession and that it was property which no one claimed—property at large—the Crown by the law of England was entitled to the fund as *bona vacantia*.

All the learning on the subject of *bona vacantia*, said Kekewich, J., is to be found in *Dyke v. Walford*, 5 Moo. P. C. 434 (1846). In support of Kekewich may also be cited *Barclay v. Russell*, 3 Ves. Jun. 424 (1793), where Lord Eldon refused to recognise the right of the Government of the United States to certain property in England, consisting of bank stock which had been purchased prior to the War of Independence by the Government of Maryland, and which was held in the name of trustees in England. Lord Eldon held that the United States could not by legislation affect property of its predecessor which was held abroad in the legal ownership of other persons. And since the specific execution of the trusts of the former Government of Maryland had become impossible, the right to dispose of the money vested in the Crown.

In view of this decision Mr. Norman Bentwich is of opinion that if any property of the former Russian Government were vested in trustees in England on any trust, the Soviet Government would not be entitled to claim such property but the Crown would be entitled to dispose of it as *bona vacantia*.

The claim, he says, further of the Soviet Government to confiscate by decree all the movable and immovable property of Russian societies in Palestine would not be accepted by any Court. The legislation of a foreign State cannot by itself affect immovable property abroad and out of its jurisdiction, when that legislation is contrary to the principles of law or the public

policy of the State in which the property is situate. "It is one thing to say that the Russian societies are dissolved, and that therefore they cannot maintain actions with respect to their property in Palestine; it is another to say that their property in Palestine has passed by virtue of the foreign legislation of the Soviet State" (d).

A further question arises as to the position of creditors of the Russian banks which have been declared by the House of Lords to be still in existence. Even if the banks were extinct and so incapable of suing, it is conceivable that their branches here could be sued and the property in their hands attached at the suit of creditors here.

As, however, it has been decided by the House of Lords that the Russian decrees have not the effect of dissolving companies in Russia, they must be taken to be still in existence. If so, those companies formed and registered in Russia which have branches or offices here may be ordered to be wound up here (e). In such winding-up proceedings contributories and creditors could take steps to protect their interests in the property situate in this country (f).

As to the property of the late Imperial Russian Government situate in this country, it was held in *Marshall v. Grinbaum* (1921), 37 T. L. R. 913, that the gold reserve of the Czarist Government deposited at the Bank of England could not be attached at the instance of bondholders of Russian stock on account of their claims for interest.

(d) Brit. Year-Book, I. L., 1924, p. 86.

(e) *In re Lloyd Generale Italiano* (1885), 29 Ch. D. 219; *In re Commercial Bank of India* (1868), 6 Eq. 517.

(f) *In re Commercial Bank of South Australia* (1886), 33 Ch. D. 174; *In re Matheson Bros., Ltd.* (1884), 27 Ch. D. 225.

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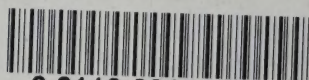
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